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No. 97-893

In the

Supreme Court of the United States

October Term, 1997

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,
Appellants,

v.

MARTIN CROMARTIE, *et al.*,
Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

JURISDICTIONAL STATEMENT

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July 6, 1998

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QUESTIONS PRESENTED

1. In a racial gerrymandering case, is an inference drawn from the challenged district's shape and racial demographics, standing alone, sufficient to support summary judgment for the plaintiffs on the contested issue of the predominance of racial motives in the district's design, when it is directly contradicted by the affidavits of the legislators who drew the district?

2. Does a final judgment from a court of competent jurisdiction, which finds a state's proposed congressional redistricting plan does not violate the constitutional rights of the named plaintiffs and authorizes the state to proceed with elections under it, preclude a later constitutional challenge to the same plan in a separate action brought by those plaintiffs and their privies?

3. Is a state congressional district subject to strict scrutiny under the Equal Protection Clause simply because it is slightly irregular in shape and contains a higher concentration of minority voters than its neighbors, when it is not a majority-minority district, it complies with all of the race neutral districting criteria the state purported to be following in designing the plan, and there is no *direct* evidence that race was the predominant factor in its design?

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LIST OF PARTIES

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official capacity as Secretary of the State of North Carolina, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER and JUNE YOUNGBLOOD in their capacity as the North Carolina State Board of Elections, are appellants in this case and were defendants below;

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R. O. EVERETT, J. H. FROELICH, JAMES RONALD LINVILLE, SUSAN HARDAWAY, ROBERT WEAVER and JOEL K. BOURNE are appellees in this case and were plaintiffs below.

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v.

MARTIN CROMARTIE, *et al.*,
Appellees.

On Appeal from the United States District Court Eastern District of North Carolina

JURISDICTIONAL STATEMENT

Governor James B. Hunt, Jr., and the other state defendants below appeal from the final judgment of the three-judge United States District Court for the Eastern District of North Carolina, dated April 6, 1998, which held that the congressional redistricting plan enacted by the North Carolina General Assembly on March 31, 1997, was unconstitutional and permanently enjoined appellants from conducting any elections under that plan.

OPINIONS BELOW

The April 14, 1998, opinion of the three-judge district court, which has not yet been reported, appears in the Appendix to this jurisdictional statement at 1a.

JURISDICTION

The district court's judgment was entered on April 6, 1998. On April 8, 1998, appellants filed an amended notice of appeal to this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment. *See* App. 169a & 171a-173a.

STATEMENT OF THE CASE

A. THE 1997 REDISTRICTING PROCESS.

In *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*), this Court held that District 12 in North Carolina's 1992 congressional redistricting plan ("the 1992 plan") violated the Equal Protection Clause because race predominated in its design and it could not survive strict scrutiny. On remand, the district court afforded the state legislature an opportunity to redraw the State's congressional plan to correct the constitutional defects found by this Court, and the legislature established Senate and House redistricting committees to carry out this task.

In consultation with the legislative leadership, the committees determined that, to pass both the Democratic-controlled Senate and the Republican-controlled House, the new plan would have to maintain the existing partisan balance in the State's congressional delegation (a six-six split between Democrats and Republicans). Toward that end, the committees sought a plan that would preserve the partisan cores of the existing districts and avoid pitting incumbents against each other, to the extent consistent with the goal of curing the constitutional defects in the old plan. To craft

"Democratic" and "Republican" districts, the committees used the results from a series of elections between 1988 and 1996.

In designing the plan, the committees of course sought to comply with the requirements of the Voting Rights Act, as well as the constitutional requirement of population equality. Acutely conscious of their responsibilities under *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), and its progeny, however, they sought a plan in which racial considerations did not predominate over traditional race-neutral districting criteria. Toward this end, they decided to emphasize the following traditional race-neutral districting principles in designing the plan: (1) avoid dividing precincts; (2) avoid dividing counties when reasonably possible;[1] (3) eliminate "cross-overs," "double cross-overs," and other artificial means of maintaining contiguity; (4) group together citizens with similar needs and interests; and (5) ensure ease of communication between voters and their representatives. The committees did not select geographic compactness as a factor that should receive independent emphasis in constructing the plan.

The committees' strategy proved successful. On March 31, 1997, the North Carolina legislature enacted a new congressional redistricting plan, 1997 Session Laws, Chapter 11 ("the 1997 plan"), the redistricting law at issue in this case. The plan is a bipartisan one, endorsed by the leadership of both parties in both houses.

B. THE 1997 PLAN.

The 1997 plan creates six "Democratic" districts and six "Republican" districts. The new districts are designed to preserve the partisan cores of their 1992 predecessors, yet their lines are significantly different: they reassign more than 25% of the State's

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[1] In North Carolina, as in most of the southeastern states, it is virtually impossible to design a congressional map that does not split any of the State's 100 counties, given the constitutional mandate of population equality and other legitimate districting concerns.

population and nearly 25% of its geographic area. The most dramatic changes are in District 12, which contains less than 70% of its original population and only 41.6% of its original geographic area.

The 1997 plan respects the traditional race-neutral districting criteria identified by the legislature: it divides only two of the State's 2,217 election precincts (and then only to accommodate peculiar local characteristics); it divides only 22 of the State's 100 counties (none among more than two districts); all of its districts are contiguous, and it does not rely on artificial devices like cross-overs and double cross-overs to achieve that contiguity.[2] Though the legislature did not emphasize geographic compactness for its own sake in designing the 1997 plan, its districts are significantly more geographically compact, judged by standard mathematical measures of geographic compactness, than their predecessors in the 1992 plan.

The 1997 plan is racially fair, but race for its own sake was not the predominant factor in its design or the design of any district within it. Indeed, 12 of the 17 African-American members of the House voted against the plan because they believed it did not adequately take into account the interests of the State's African-American residents.

District 12 is one of the six "Democratic" districts established by the 1997 plan. Seventy-five percent of the district's registered voters are Democrats, and at least 62% of them voted for the Democratic candidate in the 1988 Court of Appeals election, the 1988 Lieutenant Governor election, and the 1990 United States Senate election. District 12 is not a majority-minority district by any measure: only 46.67% of its total population, 43.36% of its voting age population,

[2] In contrast, the 1992 plan this Court invalidated in *Shaw II* divided 80 precincts; divided 44 of the State's 100 counties (seven of them among three different districts); and achieved contiguity only through artificial devices.

and 46% of its registered voter population is African-American.[3] While it does rely on the strong demonstrated support of African-American voters for Democratic candidates to cement its status as one of the six Democratic districts, partisan election data, not race, was the predominant basis for assigning those voters to the district.

District 12 respects the traditional race-neutral redistricting criteria identified by the legislature. It divides only one precinct (a precinct that is divided in all local districting plans as well); it includes parts of only six counties; and it achieves contiguity without relying on artificial devices like cross-overs and double cross-overs.[4] It creates a community of voters defined by shared interests other than race, joining together citizens with similar needs and interests in the urban and industrialized areas around the interstate highways that connect Charlotte and the Piedmont Urban Triad. Of the 12 districts in the 1997 plan, it has the third shortest travel time (1.67 hours) and the third shortest distance (95 miles) between its farthest points, making it highly accessible for a congressional representative. District 12 is significantly more geographically compact than its 1992 predecessor.

District 1 is another of the six "Democratic" districts established by the 1997 plan. Unlike District 12, District 1 is a majority-minority district by one measure: 50.27% of its total population is African-American. Like District 12, District 1 respects the traditional race-neutral redistricting criteria identified by the legislature. It contains no divided precincts; it divides only 10 counties; and it achieves contiguity without relying on artificial devices like cross-overs and

[3] In contrast, 56.63% of the total population, 53.34% of the voting age population, and 53.54% of the registered voter population of District 12 in the 1992 plan was African-American.

[4] In contrast, District 12 in the 1992 plan divided 48 precincts; included parts of ten counties; and achieved contiguity only through artificial devices.

double cross-overs.[5] It creates a community of voters defined by shared interests other than race, joining together citizens with similar needs and interests in the mostly rural and economically depressed counties in the State's northern and central Coastal Plain.

Because 40 of North Carolina's 100 counties are subject to the preclearance requirements of § 5 of the Voting Rights Act, the legislature submitted the 1997 plan to the United States Department of Justice for preclearance. The Department precleared the plan on June 9, 1997.

C. Legal Challenges To The 1997 Plan.

1. The Remedial Proceedings in *Shaw*.

Equal protection challenges to the 1997 plan were first raised in the remedial phase of the *Shaw* litigation, when the State submitted the plan to the three-judge court to determine whether it cured the constitutional defects in the earlier plan. Two of the plaintiffs who challenge the 1997 plan in the instant case -- Martin Cromartie and Thomas Chandler Muse -- participated as parties plaintiff in that remedial proceeding, represented by the same attorney who represents them in this case, Robinson Everett.[6]

In that proceeding, Cromartie, Muse, and their co-plaintiffs ("the *Shaw* plaintiffs") were given an opportunity to litigate any constitutional challenges they might have to the 1997 plan, a plan which the State had enacted under the *Shaw* court's injunction, as a

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[5] In contrast, District 1 in the 1992 plan split 25 precincts and 20 counties, and achieved contiguity only through artificial devices.

[6] The original plaintiffs in *Shaw* were five residents of District 12 as it existed under the 1992 plan. On remand from this Court's decision in *Shaw II*, Cromartie and Muse sought and obtained the district court's leave to join them as plaintiffs, in order to assert a claim that District 1 in the 1992 plan was an unconstitutional racial gerrymander -- a claim which this Court had just held that the original *Shaw* plaintiffs lacked standing to assert.

proposed remedy for the plan this Court had just declared unconstitutional.[7] They elected not to avail themselves of that opportunity. They did inform the *Shaw* court that they believed the 1997 plan to be "unconstitutional" because Districts 1 and 12 -- the same districts they now challenge in this action -- had been "racially gerrymandered." App. 183a-186a. At the same time, however, they asked the court not to decide their constitutional challenges to the proposed remedial plan. The reason they gave was somewhat curious: that the court lacked authority to entertain these claims, because none of them had standing to challenge the proposed plan under *United States v. Hays*, 515 U.S. 737 (1995).[8] For this reason, they asked the court "not [to] approve or otherwise rule on the validity of" the new plan, and to "dismiss this action without prejudice to the right of any person having standing to maintain a separate action attacking [its] constitutionality." App. 186a. The state defendants actively opposed plaintiffs' effort to reserve their constitutional challenges to the 1997 plan for a new lawsuit.

The three-judge court rejected the *Shaw* plaintiffs' argument that it lacked jurisdiction to entertain their constitutional challenges to the State's proposed remedial plan. App. 166a-168a. The court then went

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[7] App. 181a-182a (directing the *Shaw* plaintiffs to advise the court "whether they intend[ed] to claim that the [1997] plan should not be approved by the court because it does not cure the constitutional defects in the former plan" and, if so, "to identify the basis for that claim").

[8] App. 186a ("Because of the lack of standing of the Plaintiffs, there appears to be no matter at issue before this Court with respect to the new redistricting plan"). The *Shaw* plaintiffs based this argument on the assertion that none of them resided in the redrawn District 12. App. 185a-186a. The argument was somewhat disingenuous, for at least two of their number -- Cromartie and Muse -- resided in the redrawn District 1 and thus had standing to assert a racial gerrymandering challenge to the 1997 plan, even under their own bizarre reading of the *Hays* decision.

on to rule that the plan was "in conformity with constitutional requirements" and that it was an adequate remedy for the constitutional defects in the prior plan "as to the plaintiffs and plaintiff-intervenors in this case." App. 160a, 167a. On that basis, the court entered an order approving the plan and authorizing the state defendants to proceed with congressional elections under it. App. 157a-158a. The *Shaw* plaintiffs took no appeal from that order.

2. The Parallel *Cromartie* Litigation.

Having forgone an opportunity to litigate their constitutional challenges to Districts 1 and 12 in the 1997 plan before the three-judge court in *Shaw*, Cromartie and Muse immediately sought to have those same claims adjudicated by a different three-judge court. They did so by amending a complaint in a separate lawsuit they had previously filed against the same defendants, a lawsuit in which they were also being represented by Robinson Everett. In that amended complaint, Cromartie, Muse, and four persons who had not been named as plaintiffs in *Shaw* ("the *Cromartie* plaintiffs") asserted racial gerrymandering challenges to Districts 1 and 12 in the 1997 plan, the very plan the three-judge court in *Shaw* had just approved over their objection.

On January 15, 1998, the *Cromartie* case was assigned to a three-judge panel, consisting of one judge who had served on the three-judge panel in *Shaw* -- Judge Voorhees, who had dissented from the panel's decisions in *Shaw I* and *Shaw II* -- and two new judges. On January 30, 1998, the *Cromartie* plaintiffs moved for a preliminary injunction halting all further elections under the 1997 plan. Several days later, they also moved for summary judgment. The state defendants responded with a cross-motion for summary judgment.

On March 31, 1998, before it had permitted either party to conduct any discovery, the three-judge court heard brief oral arguments on the pending motions for preliminary injunction and summary judgment. Three days later, the court, with Circuit Judge

Sam J. Ervin, III, dissenting, entered an order granting the *Cromartie* plaintiffs' motion for summary judgment, declaring District 12 in the 1997 plan unconstitutional, and permanently enjoining the state defendants from conducting any elections under the 1997 plan.[9] The court's order did not explain the basis for its decision, stating only that "[m]emoranda with reference to [the] order will be issued as soon as possible." App. 45a-46a.

The state defendants immediately noticed an appeal to this Court. Since the elections process under the 1997 plan was already in full swing, they asked the district court to stay its April 3rd order pending disposition of that appeal. The district court declined to do so. The state defendants then applied to Chief Justice Rehnquist for a stay of the same order. The Chief Justice referred that application to the full Court, which denied it on April 13, 1998, with Justices Stevens, Ginsburg, and Breyer dissenting. When this Court acted on that stay application, the district court had yet to issue an opinion explaining the order and permanent injunction in question.

D. The Three-Judge District Court's Opinion.

On April 14, 1998, the three-judge court issued an opinion explaining the basis for its order of April 3, 1998. At the outset, the court ruled that "the September 12, 1997, decision of the *Shaw* three-judge panel was not preclusive of the instant cause of action, as the panel was not presented with a continuing challenge to the redistricting plan." App. 3a-4a. The court then held that the *Cromartie* plaintiffs were entitled to summary judgment on their challenge to District 12, because the "uncontroverted material facts"

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[9] The order made no reference to District 1, though the *Cromartie* plaintiffs also had moved for summary judgment on their claim that it was an unconstitutional racial gerrymander. Not until the memorandum opinion was filed on April 14, 1998, did the court explain that it was denying summary judgment as to District 1. App. 22a-23a, 53a.

established that the legislature had "utilized race as the predominant factor in drawing the District." App. 21a-22a. Unlike the lower courts whose "predominance" findings this Court upheld in *Miller*, *Bush*, and *Shaw II*, the court did not base this finding on any *direct* evidence of legislative motivation; instead, it relied wholly on an inference it drew from the district's shape and racial demographics. The court reasoned that District 12 was "unusually shaped," that it was "still the most geographically scattered" of the State's congressional districts, that its dispersion and perimeter compactness measures were lower than the mean for the 12 districts in the plan, that it "include[s] nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro," and that when it splits cities and counties, it does so "along racial lines." The court concluded that these "facts," which it characterized as "uncontroverted," established -- as a matter of law -- that the legislature had "disregarded traditional districting criteria" and "utilized race as the predominant factor" in designing District 12. App. 19a-22a.

Finally, the court held that the *Cromartie* plaintiffs were *not* entitled to summary judgment on their challenge to District 1, the only majority-minority district in the 1997 plan. The court did not explain the basis for this holding, except to say that the *Cromartie* plaintiffs had "failed to establish that there are no contested material issues of fact that would entitle [them] to judgment as a matter of law as to District 1." App. 22a. In denying the state defendants' cross-motion for summary judgment on the same claim, however, the court stated that the "contested material issue of fact" concerned "the use of race as the predominant factor in the districting of District 1." App. 23a.

Judge Ervin dissented. App. 25a. In his view, the majority's conclusion that the evidence in the summary judgment record was sufficient to establish -- as a matter of law -- that race had been the predominant factor in the design of District 12, was strikingly

inconsistent with its conclusion that the same evidence was *not* sufficient to establish that race had been the predominant factor in the design of District 1, given that the two districts were drawn by the same legislators, at the same time, as part of the same state-wide redistricting process. The inconsistency was even *more* striking, he noted, "when one considers that the legislature placed more African-Americans in District 1 . . . than in District 12." App. 38a.

E. The 1998 Interim Plan.

On April 21, 1998, the court entered an order allowing the General Assembly 30 days to redraw the State's congressional redistricting plan to correct the defects it had found in the 1997 plan. App. 55a. On May 21, 1998, the General Assembly by bipartisan vote enacted another congressional redistricting plan, 1998 Session Laws, Chapter 2 ("the 1998 plan"), and submitted it to the court for approval. The 1998 plan is effective for the 1998 and 2000 elections unless this Court reverses the district court decision holding the 1997 plan unconstitutional.[10] The Department of Justice precleared the 1998 plan on June 8, 1998.

On June 22, 1998, the district court entered an order tentatively approving the 1998 plan and authorizing the State to proceed with the 1998 elections under it. App. 175a-180a. The court explained that the plan's revisions to District 12 "successfully addressed" the concerns the court had identified in its April 14, 1998 opinion, and that it appeared, "from the record now before [the court]," that race had not been the predominant factor in the design of that revised district. The court noted that it was not ruling on the constitutionality of revised District 1, and it directed the parties to prepare for trial on

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[10] *See* 1998 N.C. Sess. Laws, ch. 2, § 1.1 ("The plan adopted by this act is effective for the elections for the years 1998 and 2000 unless the United States Supreme Court reverses the decision holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act.").

that issue. It also "reserve[d] jurisdiction" to reconsider its ruling on the constitutionality of redrawn District 12 "should new evidence emerge." App. 177a-179a.

ARGUMENT

I. SUMMARY JUDGMENT ISSUE.

The district court's application of the Rule 56 summary judgment standard in this context presents substantial questions that warrant either plenary consideration or summary reversal.

The threshold inquiry for deciding whether a district is subject to strict scrutiny under *Shaw*, turning as it does on the actual motivations of the state legislators who designed and enacted the plan, is peculiarly inappropriate for resolution on summary judgment. This Court has repeatedly affirmed its "reluctance to attribute unconstitutional motives to the states." *Mueller v. Allen*, 463 U.S. 388, 394 (1983). When a federal court is called upon to judge the constitutionality of an act of a state legislature, it must "presume" that the legislature "act[ed] in a constitutional manner," *Illinois v. Krull*, 480 U.S. 340, 351 (1987); *see McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969), and remember that it "is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (internal quotation omitted). In *Miller v. Johnson*, 515 U.S. 900 (1995), this Court made clear that these cautionary principles are fully applicable in *Shaw* cases. *See* 515 U.S. at 915 ("Although race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation, the good faith of a state legislature must be presumed.") (citations omitted). Indeed, they have even greater force in *Shaw* cases, given the sensitive and highly political nature of the redistricting process and the "serious intrusion" on state sovereignty that federal court review of state districting legislation represents. 515

U.S. at 916 (admonishing lower courts to exercise "*extraordinary caution*" in adjudicating *Shaw* claims) (emphasis added).

Ignoring this Court's directives, and oblivious to the fact that the invalidation of a sovereign state's duly-enacted electoral districting plan is not a casual matter, the court below resolved the contested issue of racial motivation -- and with it, the issue of the plan's validity -- on summary judgment. On the basis of a brief hearing, at which it heard no live evidence but merely argument from counsel, it concluded that plaintiffs had established -- as a matter of law -- that race had been the predominant factor in the construction of District 12. App. 21a-22a. In so doing, it committed clear and manifest error.

The district court's decision is flatly inconsistent with this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). There, this Court made clear that a motion for summary judgment must be resolved by reference to the evidentiary burdens that would apply at trial. *Id.* at 250-54. Where, as here, the party who seeks summary judgment will have the burden of persuasion at trial, he can obtain summary judgment only by showing that the evidence in the summary judgment record is such that no reasonable factfinder hearing that evidence at trial could possibly fail to find for him. *Id.* at 252-55. In other words, he must demonstrate that the evidence, viewed in the light most favorable to his opponent, is "so one-sided" that he would be entitled to judgment as a matter of law at trial. *Id.* at 249-52.

In this case, plaintiffs had the burden of persuasion at trial on the predominance issue. *Miller*, 515 U.S. at 916. The district court utterly ignored this critical fact in concluding that they were entitled to summary judgment on their claim challenging the constitutionality of District 12. Indeed, the court appeared to be analyzing their motion for summary judgment under the standard that applies to parties who will *not* have the burden of persuasion at trial. App. 21a (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

Had the district court applied the standard this Court's precedents direct it to apply, it could not have justified the conclusion that plaintiffs were entitled to summary judgment on their claim challenging the constitutionality of District 12. To obtain summary judgment on that claim under *Liberty Lobby*, plaintiffs were required to show that no reasonable finder of fact, viewing the evidence in the summary judgment record in the light most favorable to the state defendants, could possibly find that race had *not* been the predominant factor in its design. 477 U.S. at 252-55. The only evidence in the record tending to show that race had been the predominant motivation in the construction of District 12 was an inference the plaintiffs asked the court to draw from their evidence of the district's shape and racial demographics.[11] There was absolutely no *direct* evidence[12] of such an improper motivation before the district court: no concessions to that effect from the state defendants, and no evidence of statements to that effect in the legislation itself, the committee hearings, the committee reports, the floor debates, the State's § 5 submissions, or the post-enactment statements of those who participated in the drafting or enactment of the plan. *Compare*

[11] Plaintiffs presented various maps and demographic data as well as the affidavits of several experts who relied on the same evidence of shape and racial demographics to opine that race was the predominant factor used by the State to draw the boundaries of the congressional districts. Such postenactment testimony of outside experts "is of little use" in determining the legislature's purpose in enacting a particular statute, when none of those experts "participated in or contributed to the enactment of the law or its implementation." *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987).

[12] While the distinction between "direct" and "circumstantial" evidence is "often subtle and difficult," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting), most courts define "direct evidence" of motivation as "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged [motivation]." *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995)

Miller, 515 U.S. at 918; *Bush v. Vera*, 517 U.S. 952, 959-62, 969-71 (1996) (plur. op.); *Shaw II*, 517 U.S. at 906. This evidence was legally insufficient, even if uncontradicted, to permit a reasonable finder of fact to conclude that plaintiffs had discharged their burden of persuasion on the predominance issue. A court must "look further than a map" to conclude that race was a state legislature's predominant consideration in drawing district lines as a matter of law. *Johnson v. Mortham*, 915 F. Supp. 1529, 1565 (1995) (Hatchett, J., dissenting).[13]

By contrast, the summary judgment record contained substantial *direct* evidence that race had *not* been the predominant factor in the design of District 12. This evidence consisted of affidavits from the legislators who headed the legislative committees that drew the 1997 plan and shepherded it through the General Assembly. *See* App. 69a-84a. These legislators testified under oath that they and their colleagues were well aware, when they designed and passed the 1997 plan, of the constitutional limitations imposed by this Court's decisions in *Shaw I* and its progeny, and that they took pains to ensure that the plan did not run afoul of those limitations. They also testified under oath that the boundaries of District 12 in the plan had been motivated predominantly by partisan political concerns and other legitimate race-neutral districting considerations, rather than by racial considerations. At the summary judgment stage, the district court was obligated to accept this testimony as truthful. *See Liberty Lobby*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). The district court did precisely the opposite: it assumed that these state legislators had lied under oath about the factors that motivated them in drawing

[13] While the combination of a map and racial demographics may, under certain extraordinary circumstances, be sufficient to state a claim that race was the predominant factor in a district's design, *see Shaw I*, there is a vast difference between stating a claim and proving it.

the lines of District 12. That assumption was one this Court's precedents simply did not permit it to make at this stage of the litigation. *See id.*; *Miller*, 515 U.S. at 915-16.

The district court's application of the Rule 56 standard was so irregular that summary reversal is warranted, even if this Court concludes that the case does not present issues warranting plenary consideration. "Striking down a law approved by the democratically elected representatives of the people is no minor matter," and this Court's precedents do not permit it do be done "on the gallop." *Edwards v. Aguillard*, 482 U.S. 578, 626, 611 (1987) (Scalia, J., dissenting).

II. PRECLUSION ISSUE.

This case also raises important issues concerning the effect of a final judgment from a court of competent jurisdiction holding a state's proposed redistricting plan constitutional on the ability of the parties to that judgment and their privies to challenge the same plan again in a later lawsuit before a different court.

Two of the plaintiffs herein -- Cromartie and Muse -- participated as parties plaintiff in the remedial proceedings in *Shaw*. In those proceedings, the court offered them a full and fair opportunity to litigate any constitutional challenges they might have to the 1997 plan, which the State had proposed as a remedy for the constitutional defects found in the earlier plan. They elected not to avail themselves of that opportunity, and the *Shaw* court entered a final judgment finding the plan constitutional and authorizing the State to proceed with elections under it. Under elementary principles of claim preclusion, that final judgment extinguished any and all claims Cromartie and Muse had with respect to the validity of the 1997 plan, including the claim they now assert in this action, which challenges the plan's District 1 as a racial gerrymander. That Cromartie and Muse elected not to assert that particular claim in *Shaw* will not save it from preclusion here; indeed, the very purpose of the doctrine of

claim preclusion is to prevent plaintiffs from engaging in this sort of strategic claim-splitting.

The final judgment entered in *Shaw* also bars the claim plaintiffs Everett, Froelich, Linville, and Hardaway assert in this action, which challenges the 1997 plan's District 12 as a racial gerrymander. Though these individuals were not formally named as parties in *Shaw*, they are bound by the final judgment entered in that case because their interests were so closely aligned with those of the *Shaw* plaintiffs as to make the *Shaw* plaintiffs their "virtual representatives" in that earlier action.[14]

Ignoring fundamental principles of claim preclusion, the district court held that the final judgment entered in *Shaw* did not bar the claims appellants assert here. App. 3a-4a. The court based this conclusion on its understanding that the *Shaw* court "was not presented with a continuing challenge to the redistricting plan." App. 4a. To the extent the court meant that the *Shaw* court did not resolve

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[14] A party may be bound by a prior judgment, even though he was not formally named as a party in that prior action, when his interests were closely aligned with those of a party to the prior action and there are other indicia that the party was serving as the non-party's "virtual representative" in the prior action. *See Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir. 1996); *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345-46 (2d Cir. 1995); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994); *Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1405 (9th Cir. 1993); *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297 (5th Cir. 1992); *Jaffree v. Wallace*, 837 F.2d 1461, 1467-68 (11th Cir. 1988). The relationship between the *Shaw* plaintiffs and the four plaintiffs who challenge District 12 in this action has many of the classic indicia of "virtual representation": close relationships between the parties and the nonparties, shared counsel, simultaneous litigation seeking the same basic relief under the same basic legal theory, and apparent tactical maneuvering to avoid preclusion. *See Jaffree*, 837 F.2d at 1467.

the issue of the 1997 plan's constitutionality, it was mistaken.[15] To the extent the court meant only that the *Shaw* plaintiffs chose to assert no challenge to the 1997 plan in those earlier proceedings, it missed the central point of the doctrine of claim preclusion, which bars claims that were *or could have been* brought in the prior proceedings. The district court's holding on the preclusion issue presents substantial questions warranting either plenary consideration or summary reversal.

The district court's decision conflicts directly with this Court's cases defining the preclusive effect of a prior federal judgment. As those decisions make plain, when a federal court enters a final judgment, that judgment stands as an "absolute bar" to a subsequent action concerning the same "claim or demand" between the same parties and those in privity with them, "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but [also] as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876).

The district court's decision also conflicts with *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). In that case, this Court

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[15] The *Shaw* court did not expressly reserve the claims in question for resolution in a later proceeding. Though the *Shaw* plaintiffs asked it to "dismiss the action without prejudice to the right of any person having standing to bring a new action attacking the constitutionality of the [1997] plan," App. 186a, the court declined to do so. While the court stated that its approval of the plan was necessarily "limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us," and that it therefore did not "run beyond the plan's remedial adequacy with respect to those parties," it specifically held the plan constitutional "as to the plaintiffs . . . in this case." App. 167a, 160a. The only claim the court dismissed "without prejudice" was "the claim added by amendment to the complaint in this action on July 12, 1996," in which the *Shaw* plaintiffs "challenged on 'racial gerrymandering' grounds the creation of *former* congressional District 1." App. 158a. (emphasis added.) As the court recognized, this claim was mooted by its approval of the 1997 plan. App. 165a, 168a.

made clear that a federal court may not refuse to apply the doctrine of claim preclusion simply because it believes the prior judgment to be wrong. *Id.* at 398. As this Court explained, the doctrine of claim preclusion serves "vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case," including the interest in bringing disputes to an end, in conserving scarce judicial resources, in protecting defendants from the expense and vexation of multiple duplicative lawsuits, and in encouraging reliance on the court system by minimizing the possibility of inconsistent judgments. *Id.* at 401. The district court's decision here -- a transparent attempt to correct a perceived error in an earlier judgment that the losing party failed to appeal -- flies in the face of this bedrock principle of our civil justice system.[16]

The policies behind the doctrine of claim preclusion are at their most compelling when the claims in question seek to interfere with a state's electoral processes. The strong public interest in the orderly administration of the nation's electoral machinery requires efficient and decisive resolution of any disputes regarding these matters.[17] In this case, the district court's disregard of basic principles of claim preclusion has resulted in the entry of two dramatically inconsistent

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[16] In addition, the district court's decision conflicts, at least in principle, with the decisions of at least six federal circuit courts applying the "virtual representation" theory of privity. *See* cases cited *supra* note 14. This conflict is illustrative of the widespread confusion in the lower federal courts as to the proper scope of the "virtual representation" doctrine. *See* 18 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 131.40[3][e][I][B] (3d ed. 1997) (collecting cases); 18 C. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4457 (1981) (same).

[17] Precisely for this reason, Congress has provided for a right of direct appeal to this Court from any order of a three-judge court granting or denying a request for injunctive relief in any civil action challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. *See* 28 U.S.C. § 1253; 28 U.S.C. § 2284(a).

judgments -- one ordering the State to go forward with its congressional elections under the 1997 plan and the other enjoining it from doing so -- which have left the State's electoral process in disarray. It has significantly prolonged final resolution of the legal controversy over the constitutionality of North Carolina's congressional districts, wasting judicial resources, diverting the state legislature from the business of governing, and causing the State's taxpayers to incur significant additional expense. It is difficult to imagine a greater affront to the policies behind the doctrine of claim preclusion, to core principles of state sovereignty and federalism, and to the very integrity of the federal system of justice itself.

The district court's resolution of the preclusion issue is so flatly inconsistent with this Court's precedents that summary reversal is warranted, even if this Court concludes that the case does not present issues warranting plenary consideration.

III. PREDOMINANCE ISSUE.

In *Shaw I*, this Court first recognized that a facially race-neutral electoral districting plan could, in certain exceptional circumstances, be a "racial classification" that was subject to strict scrutiny under the equal protection clause. 509 U.S. at 642-44, 646-47, 649. Two years later, in *Miller*, this Court set forth the showing required to trigger strict scrutiny of such a districting plan: "that *race for its own sake*, and not other districting principles, was the legislature's *dominant and controlling rationale* in drawing its district lines." 515 U.S. at 913 (emphasis added). To satisfy this standard, a plaintiff must prove that the legislature "subordinated traditional race-neutral districting principles . . . to racial considerations," so that race was "the predominant factor" in the design of the districts. *Id.* at 916; *see id.* at 928-29 (O'Connor, J., concurring) (strict scrutiny applies only when "the State has relied on race in substantial disregard of customary and traditional [race-neutral] districting practices").

In *Miller*, this Court recognized that "[f]ederal court review of districting legislation represents a serious intrusion on the most vital of local functions," that redistricting legislatures are almost always aware of racial demographics, and that the "distinction between being aware of racial considerations and being motivated by them" is often difficult to draw. 515 U.S. at 915-16. For these reasons, this Court directed the lower courts to "exercise extraordinary caution" in applying the "predominance" test. *Id.* at 916; see *id.* at 928-29 (O'Connor, J., concurring) (stressing that the *Miller* standard is a "demanding" one, which subjects only "extreme instances of [racial] gerrymandering" to strict scrutiny)

In its various opinions in *Bush*, this Court made clear that proof that the legislature considered race as a factor in drawing district lines is not sufficient, without more, to trigger strict scrutiny. *See* 517 U.S. at 958 (plur. op.); *id.* at 993 (O'Connor, J., concurring); and *id.* at 999-1003 (Thomas, J., joined by Scalia, J., concurring in judgment). Nor is proof that the legislature neglected traditional districting criteria sufficient to trigger strict scrutiny. *See id.* at 962 (plur. op.); *id.* at 993 (O'Connor, J., concurring); *id.* at 1000-001 (Thomas, J., joined by Scalia, J., concurring in judgment). Instead, strict scrutiny applies only when the plaintiff establishes *both* that the State *substantially* neglected traditional districting criteria in drawing district lines, *and* that it did so *predominantly* because of racial considerations. *See id.* at 962-63 (plur. op.) and at 993-94 (O'Connor, J., concurring) (emphasis added). *Accord Shaw II*, 517 U.S. at 906-07; *Lawyer v. Justice*, 117 S. Ct. 2186, 2194-95 (1997).

In this case, the North Carolina legislature, exercising the State's sovereign right to design its own congressional districts, selected a number of traditional -- and race-neutral -- districting criteria to be used in constructing the 1997 plan: contiguity, respect for political subdivisions, respect for actual communities of interest, preserving the partisan balance in the State's congressional delegation, preserving the cores of prior districts, and avoiding contests between

incumbents. All of these criteria were ones that this Court had previously approved as legitimate districting criteria.[18] The legislature did not, however, select geographic compactness as a criterion to receive independent emphasis in drawing the plan. The 1997 plan as drawn does not neglect any of the traditional race-neutral districting criteria the legislature set out to follow; to the contrary, it substantially complies with all of them.

The district court nonetheless concluded that the legislature "disregarded traditional districting criteria" in designing District 12, because it failed to comply with two race-neutral districting principles that it never purported to be following -- specifically, the criteria of "geographical integrity" and "compactness." App. 21a-22a. The court believed the legislature's apparent disregard of these two districting principles in drawing District 12, together with evidence that the district "include[s] nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro," and that it "bypasse[s]" certain precincts with large numbers of registered Democrats, established that race, rather than partisan political preference, had been the predominant factor in the design of District 12. App. 19a-21a. This extreme misapplication of the threshold test for application of strict scrutiny in a case of such importance to the people of North Carolina warrants plenary review for at least four reasons.

First, the district court's reliance on District 12's relative lack of geographic compactness and geographical integrity was based on a fundamental misunderstanding of the nature and purpose of the

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[18] *See Miller*, 515 U.S. at 916 (contiguity, respect for political subdivisions, and respect for communities defined by shared interests other than race); *Gaffney v. Cummings*, 412 U.S. 735, 751-54 (1973) (preserving partisan balance); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (preserving the cores of prior districts and avoiding contests between incumbents); *Reynolds v. Sims*, 377 U.S. 533, 580 (1964) (ensuring "access of citizens to their representatives").

"disregard for traditional districting criteria" aspect of the *Miller* test.[19] As this Court has explained repeatedly, a state's deviation from traditional race-neutral districting criteria is important in this context *only* because it may, when coupled with evidence of racial demographics, serve as "circumstantial evidence" that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing district lines." *Miller*, 515 U.S. at 913; *see id.* at 914 ("disclose[s] a racial design"); *Bush*, 517 U.S. at 964 (plur. op.) ("correlations between racial demographics and [irregular] district lines," if not explained "in terms of non-racial motivations," tend to show "that race predominated in the drawing of district lines"). The notion is that when a state casts aside the race-neutral criteria it would normally apply in districting to draw a majority-minority district, it is very likely to have done so for predominantly racial reasons. For this inquiry to serve its purpose, it must focus not on the degree to which the challenged district deviates from some set of race-neutral districting principles that a hypothetical state -- or a federal court -- might find appropriate in designing a plan, but rather on the *precise* set of race-neutral districting principles that the *particular* state would otherwise apply in designing its districts,

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[19] Indeed, this misunderstanding of the "traditional race-neutral districting criteria" to which *Miller* refers drove the district court to the otherwise inexplicable conclusion that plaintiffs had established -- as a matter of law -- that race was the predominant factor in the design of District 12, but that they had not established -- as a matter of law -- that it was the predominant factor in the design of District 1. App. 17a-22a. The evidence that racial considerations had played a significant role in the line-drawing process was much stronger with respect to District 1 than to District 12, for it was undisputed that District 1 is a majority-minority district enacted to avoid a violation of § 2 of the Voting Rights Act. The only conceivable explanation for the district court's conclusion that District 12 was a racial gerrymander as a matter of law, but District 1 was not, was its perception that District 1 was not as "irregular" as District 12 and had better "comparative compactness indicators." App. 13a-14a.

were it not pursuing a covert racial objective. *See Quilter v. Voinovich*, 981 F. Supp. 1032, 1045 n.10 (N.D. Ohio 1997), *aff'd* 118 S. Ct. 1358 (1998) (characterizing the inquiry as "designed to identify situations in which states have neglected the criteria they would otherwise consider in pursuit of race-based objectives").

In this case, the district court evaluated District 12's compliance with traditional race-neutral districting criteria by reference to two such criteria that the people of North Carolina have *not* required their legislature to observe in districting: "geographic compactness" and "geographical integrity." In so doing, the district court apparently relied on this Court's frequent references to compactness as a traditional race-neutral districting criteria. *See, e.g., Shaw I*, 509 U.S. at 647; *Miller*, 515 U.S. at 916; *Bush*, 517 U.S. at 959-66 (plur. op.). But this Court has never indicated that the race-neutral districting criteria it has mentioned in its opinions are anything but illustrations. *See, e.g., Miller*, 515 U.S. at 916 (describing "traditional race-neutral districting principles" as "including *but not limited to* compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests") (emphasis added). Nor has this Court ever indicated that a state's deviation from abstract numerical measures of compactness has any probative value whatsoever when the state in question does *not* have a stated goal of drawing compact districts.[20]

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[20] Indeed, this Court's recent decision in *Lawyer* suggests precisely the opposite. In *Lawyer*, the plaintiffs presented evidence that the challenged state legislative district encompassed more than one county, crossed a body of water, was irregular in shape, and lacked geographic compactness. 117 S. Ct. at 2195. The district court found this evidence insufficient to establish that traditional districting principles had been subordinated to race in the district's design, because these were all "common characteristics of *Florida* legislative districts, being products of the State's geography and the fact that 40 Senate districts are superimposed on 67 counties." *Id.* (emphasis added). This Court upheld that finding, on the ground that the "unrefuted evidence show[s] that on each of these points District 21 is no different from what *Florida's* traditional districting principles could be expected to produce." *Id.* (emphasis added).

The district court's decision effectively requires all states with racially-mixed populations to comply with "objective" standards of geographic compactness in drawing their congressional and legislative districts. Such a requirement is flatly inconsistent with this Court's repeated statements that geographic compactness is not a constitutionally-mandated districting principle. *See Bush*, 517 U.S. at 962 (plur. op.); *Shaw I*, 509 U.S. at 647. It also conflicts directly with this Court's long-standing recognition that the Constitution accords the states wide-ranging discretion to design their congressional and legislative districts as they see fit, so long as they remain within constitutional bounds. *See Quilter*, 507 U.S. 156; *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). Surely this means that the states are entitled to decide which particular race-neutral districting criteria they will emphasize in drawing their districts, without worrying that strict scrutiny will apply if a federal judge disagrees with their choices.[21]

Second, the district court's decision conflicts directly with this Court's decision in *Bush*. There, a majority of this Court made clear that a district is not subject to strict scrutiny simply because there is some correlation between its lines and racial demographics if the evidence establishes that those lines were in fact drawn on the basis of political voting preference, rather than race. 517 U.S. at 968 (plur. op.) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify"); *see id.* at 1027-32 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at

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[21] This is not to suggest, of course, that a state could avoid the strict scrutiny of *Shaw* and *Miller* simply by choosing to establish "minimal or vague criteria (or perhaps none at all)," so that "it could never be found to have neglected or subordinated those criteria to race." *Quilter*, 981 F. Supp. at 1081 n.10. But that is not what happened here.

1060-61 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). Contrary to the district court's suggestion, this is not a situation like that in *Bush*, where the state has used race as a proxy for political characteristics in its political gerrymandering. Instead, the undisputed evidence in the summary judgment record showed that the State used political characteristics themselves, not racial data, to draw the lines. The legislature's use of such political data to accomplish otherwise legitimate political gerrymandering will not subject the resulting district to strict scrutiny, "regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district." *Id.* at 968 (plur. op.); *see id.* at 1027-32 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 1060-61 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting).

Third, the district court's decision raises substantial, unresolved questions concerning the circumstances under which a plaintiff can satisfy the threshold test for strict scrutiny based solely on an inference drawn from a district's shape and racial demographics. *Miller* held that a plaintiff can prove the legislature's predominantly racial motive with either "circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose." 515 U.S. at 916. In all of its prior cases finding the threshold test for strict scrutiny met, however, this Court has relied heavily on substantial *direct* evidence of legislative motivation. *See id.* at 918 (relying on the State's § 5 submissions, the testimony of the individual state officials who drew the plan, and the State's formal concession that it had deliberately set out to create majority-minority districts in order to comply with the Department of Justice's "black maximization" policy); *Bush*, 517 U.S. at 959-61, 969-71 (plur. op.) (same); *id.* at 1002 & n.2 (Thomas, J., concurring in the judgment) (same); *Shaw II*, 517 U.S. at 906 (same). As a result, this Court has never confronted the question of how much circumstantial evidence is enough to satisfy the *Miller* predominance standard, in the absence

of any direct evidence of racial motivation. *See Miller*, 515 U.S. at 917 (specifically reserving this issue).

The plaintiffs in this case, unlike those in *Miller*, *Bush*, and *Shaw II*, base their claim that race was the predominant factor in the design of Districts 12 solely on circumstantial evidence of shape and racial demographics. Yet their circumstantial evidence is decidedly less powerful than that presented by their counterparts in *Miller*, *Bush*, and *Shaw II*. First, and most fundamentally, the district they challenge is not a majority-minority district, as were the districts at issue in those cases. This Court's recent decision in *Lawyer*, which rejected a claim that a challenged Florida state senate district was a racial gerrymander, makes clear that this is an important distinction. 117 S. Ct. at 2191, 2195 (emphasizing that the challenged district was not majority-black and noting that "similar racial composition of different political districts" is not "necessary to avoid an inference of racial gerrymandering in any one of them."). In addition, the shape of the district challenged here, though somewhat irregular, does not reveal "substantial" disregard for traditional race-neutral districting principles.[22] Finally, the undisputed evidence here established that the racial data the legislature used in designing these districts was no more detailed than the other demographic data it used. *Compare Bush*, 517 U.S. at 962-67, 969-71, 975-76 (plur. op.) (finding

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[22] In sharp contrast to former District 12, which this Court invalidated in *Shaw II*, current District 12 is contiguous, respects the integrity of political subdivisions to the extent reasonably possible, and creates a community of interest defined by criteria other than race. While it has relatively low dispersion and perimeter compactness measures, this is insufficient to support a finding that the legislature "substantially" disregarded traditional districting criteria in designing it, even if geographic compactness can be considered one of the State's "traditional districting criteria." *See Quilter*, 981 F. Supp. at 1048 (expressing "doubt" that a state's neglect of *one* of its many traditional districting criteria "would be sufficient to show the kind of flagrant disregard that would indicate that traditional districting principles were subordinated to racial objectives").

legislature's use of racial data that was significantly more detailed than its data on other voter demographics strong circumstantial evidence that race had been its predominant consideration in designing the challenged districts).

On this record, there is a substantial question whether plaintiffs' evidence of shape and racial demographics is sufficient to support an inference that race was the predominant factor in the design of District 12. Indeed, the evidence of shape and demographics here closely resembles that offered by the plaintiffs in *Lawyer*, which this Court found insufficient to support an inference of racial gerrymandering. *See* 117 S. Ct. at 2195. In addition, the state defendants rebutted any such inference with substantial *direct* evidence that partisan political preference, and not race, had been the predominant factor in the district's design. Under this Court's decisions, that should have been sufficient to avoid strict scrutiny, in the absence of any direct evidence of racial motivation. *See Shaw I*, 509 U.S. at 653, 658 (indicating that State can avoid strict scrutiny by "contradicting" the inference of racial motivation that arises from plaintiffs' evidence of shape and racial demographics); *Miller*, 515 U.S. at 916 (strict scrutiny does not apply where the state establishes that "race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race").[23]

Finally, the district court's decision sets far too low a threshold for subjecting a state's districting efforts to strict -- and potentially fatal -- constitutional review. Under its reasoning, a private plaintiff can trigger strict scrutiny of a state redistricting plan simply by

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[23] In an analogous "mixed motives" situation -- the individual disparate treatment case under Title VII -- four members of this Court have endorsed a rule that would require plaintiff to produce "direct evidence" that the impermissible criterion was a substantial motivating factor in the challenged decision in order to prevail. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275-76 (1989) (O'Connor, J., concurring), 290 (Kennedy, J., joined by Rehnquist, C.J. and Scalia, J., dissenting).

showing that its districts are somewhat irregular in shape and that some of them have heavier concentrations of minority voters than others. If strict scrutiny is this easily triggered, the states, particularly those subject to the preclearance requirements in § 5 of the Voting Rights Act, will find themselves in an impossible bind. If they take race into account in districting, in order to avoid violating the Voting Rights Act, they face private lawsuits under the Equal Protection Clause; but if they do not, they face both denial of preclearance under § 5 of the Voting Right Act and private lawsuits under § 2. *See Bush*, 517 U.S. at 990-95 (O'Connor, J., concurring) (noting the tension between the Voting Rights Act, which requires the states to consider race in districting, and the Fourteenth Amendment, which requires courts "to look with suspicion on the[ir] excessive use of racial considerations"). Nearly every plan they draw will be subject to challenge on one ground or the other, nearly every plan will be the subject of protracted litigation in the federal courts, and the federal courts will become the principal architects of their congressional and legislative districting plans. This Court should not tolerate such an unprecedented intrusion by the federal judiciary into this "most vital" aspect of state sovereignty. *Miller*, 515 U.S. at 915.

The district court's extreme misapplication of the threshold test for strict scrutiny illustrates the need for this Court to provide additional guidance on its proper application in cases where there is no direct evidence of racial motivation, the district in question is not a majority-minority district, and it does not disregard the State's stated race-neutral districting criteria. This situation will arise with some frequency in the next round of *Shaw* cases, particularly in states like North Carolina, which remain subject to a realistic threat of liability under § 2 of the Voting Rights Act if they do not pay close attention to racial fairness in districting. As Justice O'Connor recognized in *Bush*, these states -- and the lower courts -- are entitled to "more definite guidance as they toil with the twin demands of the Fourteenth

Amendment and the VRA." 517 U.S. at 990 (O'Connor, J., concurring).

CONCLUSION

For the forgoing reasons, this Court should summarily reverse the April 6, 1998 judgment of the district court and remand the case for trial. In the alternative, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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July 6, 1998

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OPINIONS OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 14, 1998

[Caption Omitted in Printing]

MEMORANDUM OPINION

This matter is before the Court on the Plaintiffs' Motions for Preliminary Injunction and for Summary Judgment, and on the Defendants' Motion for Summary Judgment. The underlying action challenges the congressional redistricting plan enacted by the General Assembly of the State of North Carolina on March 31, 1997, contending that it violates the Equal Protection Clause of the Fourteenth Amendment, and relying on the line of cases represented by *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996) ("*Shaw II*"), and *Miller v. Johnson*, 515 U.S. 900, 904, 115 S. Ct. 2475, 2482, 132 L. Ed. 2d 762 (1995).

Following a hearing in this matter on March 31, 1998, the Court took the parties' motions under advisement and thereafter issued an Order and Permanent Injunction (1) finding that the Twelfth Congressional District under the 1997 North Carolina Congressional Redistricting Plan is unconstitutional, and granting Plaintiffs' Motion for Summary Judgment as to the Twelfth Congressional District; (2) granting Plaintiffs' Motion for Preliminary Injunction and granting Plaintiffs' request, as contained in its Complaint, for a Permanent Injunction, thereby enjoining Defendants from conducting any

primary or general election for congressional offices under the redistricting plan enacted as 1997 N.C. Session Laws, Chapter 11; and (3) ordering that the parties file a written submission addressing an appropriate time period within which the North Carolina General Assembly may be allowed the opportunity to correct the constitutional defects in the 1997 Congressional Redistricting Plan, and to present a proposed election schedule to follow redistricting which provides for a primary election process culminating in a general congressional election to be held on Tuesday, November 3, 1998, the date of the previously scheduled general election.

That Order was issued on April 3, 1998, by a majority of the three-judge panel. Circuit Judge Sam J. Ervin, III, dissented. Defendants filed a Motion for a Stay of the April 3 Order, which was denied by this Court by Order dated April 6, 1998. Defendants also appealed the April 3 Order to the Supreme Court, and the appeal is still pending in that Court. This Memorandum and Opinion refers to that Order, and shall be the opinion of the Court.

BACKGROUND

In *Shaw II* the United States Supreme Court held that the Twelfth Congressional District created by the 1992 Congressional Redistricting Plan (hereinafter, the "1992 plan") had been race-based and could not survive the required "strict scrutiny." 517 U.S. 899, 116 S. Ct. 1894. The five plaintiffs

in *Shaw* lacked standing to attack the other majority-minority district (the First Congressional District under the 1992 plan) because they were not registered voters in the district. *Id.*

Soon after the Supreme Court ruled in *Shaw II*, three residents of Tarboro, North Carolina, filed the original Complaint in this action on July 3, 1996. These original Plaintiffs resided in the First Congressional District (alternatively, "District 1") as it existed under North Carolina's 1992 plan. The Plaintiffs charged that the First Congressional District violated their rights to equal protection under the United States Constitution because race predominated in the drawing of the District. The action was stayed pending resolution of remand proceedings in *Shaw v. Hunt*, and on July 9, 1996, the same three Tarboro residents joined the Plaintiffs in *Shaw* in filing an Amended Complaint in that case, similarly challenging District l.

By Order dated September 12, 1997, the three-judge panel in *Shaw* approved a congressional redistricting plan enacted on March 31, 1997, by the General Assembly as a remedy for the constitutional violation found by the Supreme Court to exist in the Twelfth Congressional District (alternatively, "District 12"). The *Shaw* three-judge panel also dismissed without prejudice, as moot, the plaintiffs' claim that the First Congressional District in the 1992 plan was unconstitutional. Although it was a final order, the September 12, 1997, decision of the *Shaw* three-judge panel was not preclusive of

the instant cause of action, as the panel was not presented with a continuing challenge to the redistricting plan.[1]

On October 17, 1997, this Court dissolved the stay previously entered in this matter. On the same day, two of the original three Plaintiffs, along with four residents of District 12, filed an amended Complaint challenging the 1997 remedial congressional redistricting plan (the "1997 plan"), and seeking a declaration that the First and Twelfth Congressional Districts in the 1997 plan are unconstitutional racial gerrymanders. The three-judge panel was designated by order of Chief Judge Wilkinsion [sic] of the Fourth Circuit Court of Appeals, dated January 23, 1998. The Plaintiffs moved for a preliminary injunction on January 30, 1998, and for summary judgment on February 5, 1998. The Defendants filed their instant summary

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[1] In its final Memorandum Opinion, the three-judge panel in *Shaw*, noted that there was "no substantive challenge to the [1997] plan by any party to this action," and closed by explicitly "noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not-cannot-run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12." *Shaw v. Hunt*, No. 92-202-CIV-5-BR, at 8 (E.D.N.C. Sept. 12, 1997).

judgment motion on March 2, 1998, and a hearing on these motions was held on March 31, 1998.

FACTS

The North Carolina General Assembly convened in regular session on January 29, 1997, and formed redistricting committees to address the defects found in the 1992 plan. These newly formed House and Senate Committees aimed to identify a plan which would cure the constitutional defects and receive the support of a majority of the members of the General Assembly. Affidavit of Senator Roy A. Cooper, III ("Cooper Aff.") ¶3. In forming a workable plan, the committees were guided by two avowed goals: (1) curing the constitutional defects of the 1992 plan by assuring that race was not the predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation. Cooper Aff. ¶¶5, 8, 10, 14; Affidavit of Gary O. Bartlett, Executive Secretary-Director of the State Board of Elections ("Bartlett Aff."), Vol. I Commentary at 9-10.

To achieve the second goal, the redistricting committees draw the new plan (1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan. Cooper Aff. ¶14. The plan as enacted reflects these directives: no two incumbent Congressmen reside in the same district, and each district retains at least

60% of the population of the old district. Cooper Aff. ¶8, Affidavit of Representative W. Edwin McMahan ("McMahan Aff.") ¶7.

I. The Twelfth Congressional District

District 12 is one of the six predominantly Democratic districts established by the 1997 plan to maintain the 6-6 partisan division in North Carolina's congressional delegation. District 12 is not a majority-minority district,[2] but 46.67 percent of its total population is African-American. Bartlett Aff., Vol. I Commentary at 10 and 11. District 12 is composed of six counties, all of them split in the 1997 plan. The racial composition of the parts of the six sub-divided counties assigned to District 12 include three with parts over 50 percent African-American, and three in which the African-American percentage is under 50 percent. Declaration of Ronald E. Webber ("Webber Dec.") ¶18. However, almost 75 percent of the total population in District 12 comes from the three county parts which are majority African-American in population: Mecklenburg, Forsyth, and Guilford counties. *Id.* The other three county parts (Davidson, Iredell, and Rowan) have narrow

[2] The Twelfth is not a majority-minority district as measured by any of three possible criteria. African-Americans constitute 47 percent of the total population of District 12, 43 percent of the voting age population of the District, and 46 percent of the registered voters in the District. Peterson Aff., at 8.

corridors which pick up as many African-Americans as are needed for the district to reach its ideal size.[3] *Id.*

Where Forsyth County was split, 72.9 percent of the total population of Forsyth County allocated to District 12 is African-American, while only 11.1 percent of its total population assigned to neighboring District 5 is African-American. *Id.* ¶20. Similarly, Mecklenburg County is split so 51.9 percent of its total population allocated to District 12 is African-American, while only 7.2 percent of the total population assigned to adjoining District 9 is African-American.

A similar pattern emerges when analyzing the cities and towns split between District 12 and its surrounding districts: the four largest cities assigned to District 12 are split along racial lines. *Id.* ¶23. For example, where the City of Charlotte is split between District 12 and adjacent District 9, 59.47 percent of the population assigned to District 12 is African-American, while only 8.12 percent of the Charlotte population assigned to District 9 is African-American. Affidavit of Martin B. McGee ("McGee Aff."), Ex. L. And where the City of Greensboro is split, 55.58 percent of the population assigned to District 12 is African-American, while only 10.70 percent of the population assigned to District 6 is African-American. *Id.*

[3] An equitably populated congressional district in North Carolina needs a total population of about 552,386 persons using 1990 Census data. Weber Dec. ¶39.

An analysis of the voting precincts immediately surrounding District 12 reveals that the legislature did not simply create a majority Democratic district amidst surrounding Republican precincts. For example, around the Southwest edge of District 12 (in Mecklenburg County), the legislature included within the district's borders several precincts with racial compositions of 40 to 100 percent African-American; while excluding from the district voting precincts with less than 35 percent African-American population, but heavily Democratic voting registrations. Among Mecklenburg County precincts which are immediately adjacent to District 12, but not inside it, are precincts with 58.818 percent of voters registered as Democrats, and precincts that are 56.464 percent Democratic 54.213 percent Democratic, 59.135 percent Democratic, 59.225 percent Democratic, 54.498 percent Democratic, 59.098 percent Democratic, 55.72 percent Democratic, 54.595 percent Democratic, 54.271 percent Democratic, 63.452 percent Democratic, and 59.453 percent Democratic. *Id.*, Ex. P. Similarly, Forsyth County precincts that are immediately adjacent to, but not inside, District 12 include precincts with 57.371 percent Democratic registration, 65.253 percent Democratic registration, 65.747 percent Democratic registration, 65.747 percent Democratic registration, 76 percent Democratic registration, 55.057 percent Democratic registration, 55.907 percent Democratic registration, 56.782 percent Democratic registration, 55.836 percent Democratic registration, and 60.113 percent Democratic registration. *Id.*, Ex. O. Finally, District 12 was drawn to exclude precincts with 59.679

percent Democratic registration, 61.86 percent Democratic registration, 58.145 percent Democratic registration, 62.324 percent Democratic registration, 60.209 percent Democratic registration, 56.739 percent Democratic registration, 66.22 percent Democratic registration, 57.273 percent Democratic registration, 55.172 percent Democratic registration, and 63.287 percent Democratic registration, all in Guilford County. *Id.*, Ex. N.

On the North Carolina map, District 12 has an irregular shape and is barely contiguous in parts. Its Southwest corner lies in Mecklenburg County, very close to the South Carolina border, and includes parts of Charlotte. The District moves North through Rowan County and into Iredell County. There it juts West to pick up parts of the City of Statesville. More than 75 percent of the Statesville population that is included in District 12 is African-American, while only 18.88 percent of the population of Statesville excluded from District 12 is African-American. McGee Aff., Ex. L. From Statesville, the District moves East into Rowan County. There it dips to the South to include Salisbury, before turning to the Northeast and entering Davidson County and the City of Thomasville. Over 41 percent of the populations of Salisbury and Thomasville that are included in District 12 are African-American, while only 15.39 and 9.55 percent, respectively, of those that are excluded from the District are African American. *Id.* The District makes a northwesterly incursion into Forsyth County to include parts of Winston-Salem, where 77.39 percent of the population

within District 12 is African-American, and only 16.06 percent of the population left out is African-American. *Id.* The District moves to the East and narrows dramatically before opening up again to include the predominantly African-American parts of Greensboro, where the District ends.

Objective, numerical studies of the compactness of congressional districts are also available. In his report, "An Evaluation of North Carolina's 1998 Congressional Districts," Professor Gerald R. Webster, one of the Defendants' expert witnesses, presents statistical analyses of "comparator compactness indicators" for North Carolina's congressional districts under the 1997 plan. In measuring the districts' dispersion compactness[4] and perimeter compactness,[5] Professor Webster offers two of the "most commonly recognized and applied" compactness indicators. Webster, at 13 (citing Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights:

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[4] "Dispersion compactness" measures the geographic "dispersion" of a district. To calculate this a circle is circumscribed around a district. The reported coefficient is the proportion of the area of the circumscribed circle which is also included in the district. This measure ranges from 1.0 (most compact) to 0. 0 (least compact). Webster, at 14.

[5] "Perimeter compactness" is based upon the calculation of the district's perimeter. The reported coefficient is the proportion of the area in the district relative to a circle with the same perimeter. This measure ranges from 1.0 (most compact) to 0.0 (least compact). Webster, at 14. The equation used here is (((4 x ∏) x Area of district) ÷ (District's Perimeter2)). Webster, at table 3.

Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 571-573, table 6 (1993) (hereinafter, "Pildes & Niemi"); *and see Bush v. Vera*, 517 U.S. 952, ___, 116 S. Ct. 1941, 1952, 135 L. Ed. 2d 248 (1996) (citing Pildes & Niemi compactness factors as supporting evidence for holding three Texas congressional districts unconstitutional).

In discussing the relative normalcy of various compactness measures, Pildes and Niemi suggest that a "low" dispersion compactness measure would be equal to or less than 0.15. Pildes & Niemi, at 564. They suggest that a "low" perimeter compactness measure is equal to or less than 0.05. *Id.* North Carolina's Twelfth Congressional District under the 1997 plan has a dispersion compactness indicator of 0.109 and a perimeter compactness indicator of 0.041. Webster, at table 3. These figures are much lower than the mean compactness indicators for North Carolina's twelve congressional districts under the 1997 plan. The average dispersion compactness indicator for the State is 0.354, and the average perimeter compactness indicator is 0.192. *Id.* The next lowest dispersion compactness indicator after District 12 is the 0.206 in the Fifth Congressional District, and the next lowest perimeter compactness indicator is the First Congressional District's 0.107. *Id.*

II. The First Congressional District

District 1 is another predominantly Democratic district established by the 1997 plan. Unlike District 12, it is a

majority-minority district, based on percentages of the total population of the District,[6] as 50.27 percent of its total population is African-Americans. *Id.*, Vol. I Commentary at 10. District 1 is composed of ten of the 22 counties split in drawing the statewide 12 district 1997 plan. Weber Dec. ¶16. Half of the twenty counties represented in District 1 are split. *Id.* Of the ten sub-divided counties assigned to District 1, four have parts with over 50 percent African-American population, four others have parts with over 40 percent African-American population, and two others have parts with over 30 percent African-American population. *Id.*, ¶17.

In each of the ten counties that are split between District 1 and an adjacent district, the percent of the population that is African-American is higher inside the district than it is outside the district, but within the same county. *Id.*, ¶19 and Table 2. The disparities are less significant than in the county splits involving District 12. *Id.*, Table 2. For example, where Beaufort County is split between Districts 1 and 3, 37.7 percent of the total population of Beaufort County allocated to District 1 is African-American, while 22.9 percent of the total population of Beaufort County assigned to District 3 is African-American.

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[6] While 50.27 percent of the total population of District 1 is African-American, only 46.54 percent of the voting age population is African-American, based on the 1990 census data. Bartlett Aff., Vol. I Commentary at 10.

Similarly, nine of the 13 cities and towns split between District 1 and its neighboring districts are split along racial lines. *Id.*, ¶22. For example, where the City of New Bern is split between District 1 and adjacent District 3, 48.27 percent of the population assigned to District 1 is African-American, while 24.49 percent of the New Bern population assigned to District 3 is African-American. McGee Aff., Ex. L.

Viewed on the North Carolina map, District 1 is not as irregular as District 12. In the North, it spans 151.2 miles across, from Roxboro, Person County, in the West, to Sunbury, Gates County, in the East. Affidavit of Dr. Alfred W. Stuart ("Stuart Aff."), table 1. It is shaped roughly like the state of Florida, although the protrusion to the South from its "panhandle" is only approximately 150 miles long (to Goldsboro, Wayne County, with two irregularities jutting into Jones, Craven, and Beaufort Counties. Cooper Aff., attachments. These irregularities surround the peninsular extension of the Third Congressional District from the East, allowing the incumbent from the previous Third Congressional District to retain his residence within the boundaries of the same district, and avoiding placing two incumbents in District 1.

The "comparator compactness indicators" from District 1 are much closer to the North Carolina mean compactness indicators than are those from District 12. For example, District 1 has a dispersion compactness indicator of 0.317 and a perimeter compactness indicator of 0.107. Webster, at table

3. This dispersion compactness indicator is not significantly lower than the State's mean indicator of 0.354, and is higher than the dispersion compactness indicators of Districts 12 (0.109), 9 (0.292), and 5 (0.206). *Id.* It may be noted that Districts 5 and 9 are next to, and necessarily shaped by, District 12. District 1 has a perimeter compactness indicator of 0.107, which is lower than North Carolina's mean perimeter compactness indicator (0.192), but much higher than Pildes and Niemi's suggested "low" perimeter compactness indicator (0.05). District 1's perimeter compactness indicator is also much higher than that of District 12 (0.041). *Id.*

DISCUSSION

The Equal Protection Clause of the United States Constitution provides that no State "shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, § 1. The United States Supreme Court explained in *Miller v. Johnson*, 515 U.S., at 904, 115 S. Ct., at 2482, that the central mandate of the Equal Protection Clause "is racial neutrality in governmental decisionmaking." Application of this mandate clearly prohibits purposeful discrimination between individuals on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 2824, 125 L. Ed. 2d 511 (1993) ("*Shaw I*"), (citing *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L. Ed. 2d 597 (1976)).

As the Supreme Court recognized, however, the use of this principle in "electoral districting is a most delicate task." *Miller*, 515 U.S., at 905, 115 S. Ct., at 2483. Analysis of suspect districts must begin from the premise that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition." *Shaw I*, 509 U.S., at 642, 113 S. Ct., at 2824. Beyond that, however, the Fourteenth Amendment's prohibition "extends not just to explicit racial classifications," *Miller*, 515 U.S., at 905, 115 S. Ct., at 2483, but also to laws, neutral on their face, but "unexplainable on grounds other than race," *Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252, 266, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (1977).

In challenging the constitutionality of a State's districting plan, the "plaintiff bears the burden of proving the race-based motive and may do so either through 'circumstantial evidence of a district's shape and demographics' or through 'more direct evidence going to legislative purpose.' " *Shaw II*, 517 U.S., at ____, 116 S. Ct., at 1900 (quoting *Miller*, 515 U.S., at 916, 115 S. Ct., at 2488). In the final analysis, the plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.*, (quoting *Miller*, 515 U.S., at 916, 115 S. Ct., at 2488).

Once a plaintiff demonstrates that race was the predominant factor in redistricting, the applicable standard of review

of the new plan is "strict scrutiny." Thus, in *Miller* the Supreme Court held that strict scrutiny applies when race is the "predominant" consideration in drawing the district lines such that "the legislature subordinate[s] race-neutral districting principles . . . to racial considerations." 515 U.S., at 916, 115 S. Ct., at 2488. Under this standard of review, a State may escape censure while drawing racial distinctions only if it is pursuing a "compelling state interest." *Shaw II*, 517 U.S., at ___, 116 S. Ct., at 1902.

However, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, 106 S. Ct. 1842, 1850, 90 L. Ed. 2d 260 (1986) (opinion of Powell, J.). As the Supreme Court required in *Shaw II*, where a State's plan has been found to be a racial gerrymander, that State must now "show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its districting legislation is narrowly tailored to achieve that compelling interest." 517 U.S., at ___, 116 S. Ct., at 1902.

We are cognizant of the principle that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt." *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S. Ct. 2493, 2497, 57 L. Ed. 2d 411 (1978) (citations omitted). "A State should be given the opportunity to make its own redistricting decisions so

long as that is practically possible and the State chooses to take the opportunity. When it does take the opportunity, the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law." *Lawyer v. Dep't of Justice*, ___ U.S. ___, ___, 117 S. Ct. 2186, 2193, 138 L. Ed. 2d 669 (1997) (internal citations omitted). Thus, when the federal courts declare an apportionment scheme unconstitutional-as the Supreme Court did in *Shaw II*-it is appropriate, "whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S., at 540, 98 S. Ct., at 2497.

I. The Twelfth Congressional District

As noted above, the final decision of the three-judge panel in *Shaw* only approved the 1997 Congressional Redistricting Plan "as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12." *Shaw v. Hunt*, No. 92-202-CIV-5-BR, at 8 (E.D.N.C. Sept. 12, 1997). In the instant case, we are faced with a ripe controversy as to the newly-configured Twelfth Congressional District. This panel must thus decide whether, as a matter of law, District 12 violates the equal protection

rights of the Plaintiffs who live within the district and challenge its constitutionality.

In holding that District 12 under the 1992 plan was an unconstitutional racial gerrymander, the Supreme Court in *Shaw II* noted, "[n]o one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race." 517 U.S., at ___, 116 S. Ct., at 1906. The *Shaw II* Court thus struck the old District 12 as unconstitutional as a matter of law. In redrawing North Carolina's congressional districts in 1997 the General Assembly was, of course, aware that District 12 under the 1992 plan had been declared unconstitutional; curing the constitutional deficiencies was one of the legislature's declared goals for the redistricting process. Cooper Aff. ¶¶5, 8, 10, 14.

Defendants now argue that the changes in District 12 between the 1992 and 1997 plans are dramatic enough to cure it of its constitutional defects. They point to the fact that the new District 12 has lost nearly one-third (31.6 percent) of the population from the 1992 district and nearly three-fifths (58.4 percent) of the land. These numbers do not advance the Defendants' argument or end the Court's inquiry. As Defendants themselves note, the Court's role is limited to determining "whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights-that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in

place." *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988) (citing *Upham v. Seamon*, 456 U.S. 37, 42, 102 S. Ct. 1518, 1521, 71 L. Ed. 2d 725 (1982)). A comparison of the 1992 District 12 and the present District is of limited value here. The issue in this case is whether District 12 in the present plan violates the equal protection rights of the voters residing within it.

In *Shaw I*, the Supreme Court described old District 12 as "unusually shaped. It is approximately 160 miles long and for much of its length, no wider than the [Interstate]-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods." 509 U.S., at 635-636, 113 S. Ct., at 2820-2821 (internal quotations omitted). Viewed without reference to District 12 under the 1992 plan, the new District 12 is also "unusually shaped." While its length has been shortened to approximately 95 miles, it still winds its way from Charlotte to Greensboro along the Interstate-85 corridor, making detours to pick up heavily African-American parts of cities such as Statesville, Salisbury, and Winston-Salem. It also connects communities not joined in a congressional district, other than in the unconstitutional 1992 plan, since the whole of Western North Carolina was one district, nearly two hundred years ago. Pl.'s Brief Opp. Def.'s Mot. S.J., at 12.

As noted above, where cities and counties are split between District 12 and neighboring districts, the splits are exclusively along racial lines, and the parts of the divided cities and counties having a higher proportion of African-Americans are always included in District 12. Defendants argue that the Twelfth has been designed with politics and partisanship, not race, in mind. They describe the District as a "Democratic island in a Republican sea," and present expert evidence that political identification was the predominant factor determining the border of District 12. Affidavit of David W. ("Peterson Aff."), at 2. As the uncontroverted material facts demonstrate, however, the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District. The common thread woven throughout the districting process is that the border of District 12 meanders to include nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro, inclusive.

As noted above, objective measures of the compactness of District 12 under the 1997 plan reveal that it is still the most geographically scattered of North Carolina's congressional districts. When compared to other previously challenged and reconstituted congressional districts in North Carolina, Florida, Georgia, Illinois, and Texas, District 12 does not fare well. The District's dispersion and perimeter compactness indicators (0.109 and 0.041, respectively) are lower than those values for North Carolina's District 1 (0.317 and 0.107 under the 1997 plan). Similarly, the District suffers in comparison to Florida's District 3 (0.136 and 0.05), Georgia's District 2 (0.541 and 0.411) and District 11 (0.444 and 0.259), Illinois' District 4 (0.193 and 0.026), and Texas District 18 (0.335 and 0.151), District 29 (0.384 and 0.178), and District 30 (0.383 and 0.180).

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must demonstrate the lack of a genuine issue of fact for trial, and if that burden is met, the party opposing the motion must show evidence of a genuine factual dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

Based on the uncontroverted material facts before it, the Court concludes that the General Assembly, in redistricting, used criteria with respect to District 12 that are facially race driven. District 12 was drawn to collect precincts with high racial identification rather than political identification. Further, the uncontroverted material facts demonstrate that precincts with higher partisan representation (that is, more heavily Democratic precincts) were bypassed in the drawing of District 12 and included in the surrounding congressional districts. The legislature disregarded traditional districting criteria such as contiguity, geographical integrity, community

of interest, and compactness in drawing District 12 in North Carolina's 1997 plan. Instead, the General Assembly utilized race as the predominant factor in drawing the District, thus violating the rights to equal protection guaranteed in the Constitution to the citizens of District 12.[7]

To remedy these constitutional deficiencies, the North Carolina legislature must redraw the 1997 plan in such a way that it avoids the deprivation of the voters' equal protection rights not to be classified on the basis of race. This mandate of the Court leaves the General Assembly free, within its authority, to use other, proper factors in redrawing the 1997 plan. Among these factors, the legislature may consider traditional districting criteria, including incumbency considerations, to the extent consistent with curing the constitutional defects. *See Shaw II*, 517 U.S., at ___, 116 S. Ct., at 1901 (describing "race-neutral, traditional districting criteria").

II. First Congressional District

Based on the record before us, the Plaintiff has failed to establish that there are no contested material issues of fact that would entitle Plaintiff to judgment as a matter of law as to District 1. The Court thus denies Plaintiffs' Motion for Sum-

[7] The Supreme Court has indicated that, when drawing congressional districts, race may not be used as a proxy for political characteristics. *Vera v. Bush*, 517 U.S. 952, ___, 116 S. Ct. 1941, 1956, 135 L. Ed. 2d 248 (1996).

mary Judgment as to that District. Conversely, neither has the Defendant established the absence of any contested material issue of fact with respect to the use of race as the predominant factor in the districting of District 1 such as would entitle Defendant to judgment as a matter of law.

CONCLUSION

Based on the Order of this Court entered on April 3, 1998, and the foregoing analysis, Defendants will be allowed the opportunity to correct the constitutional defects in the 1997 Congressional Redistricting Plan, in default of which the Court would undertake the task.

This Memorandum Opinion, like the Order to which it refers, is entered by a majority of the three-judge panel. Circuit Judge Sam J. Ervin, III, dissents.

This, the 14th day of April, 1998.

TERRENCE W. BOYLE
Chief United States District Judge
RICHARD L. VOORHEES
United States District Judge

/s/ TERRENCE W, BOYLE
Chief United States District Judge

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[Caption Omitted in Printing]

DISSENT

ERVIN, Circuit Judge, dissenting:

In *Shaw v. Reno*, the Supreme Court recognized a new cause of action in voting rights law -- that state legislatures could not subordinate traditional districting principles to racial considerations in drawing legislative districts without triggering strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, 509 U.S. 630 (1993) (*"Shaw I"*). Because the districting plan before us is fundamentally different from the plans struck down by the Court in *Shaw I* and its progeny, *see Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899, 135 L. Ed. 2d 207 (1996) (*"Shaw II"*); *Bush v. Vera*, 517 U.S. 952, 135 L. Ed. 2d 248 (1996), I do not believe that the Plaintiffs have proven any violation of their right to the equal protection of the laws.

North Carolina's twelfth congressional district is not a majority-minority district, it was not created as a result of strong-arming by the U.S. Department of Justice, and, contrary to the majority's assertions, it is not so bizarre or unusual in shape that it cannot be explained by factors other than race. The Plaintiffs' evidence is not so convincing as to undermine the State's contention that the 1997 Plan was motivated by a desire to remedy the constitutional violations from the 1992 Plan, to preserve the even split between Republicans and

Democrats in the North Carolina congressional delegation, and to protect incumbents by drawing the districts so that each incumbent resides in a separate district. Our acceptance of the State's proffered justifications, absent more rigorous proof by the Plaintiffs, is especially appropriate in this context, considering the deference that we are bound to accord state legislative decisions in questions of redistricting. Finally, I find it inconsistent to decide, as the majority has done today, that the General Assembly, while engaging in a state-wide redistricting process, was impermissibly influenced by predominantly racial considerations in the drawing of one district (the twelfth) while evidencing no such unconstitutional predilection in the other district under challenge (the first), or for that matter, any of North Carolina's other ten congressional districts. For these reasons, I must respectfully dissent.

I.

In order to prevail on a race-predominance claim, the Plaintiffs must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. The principle that race cannot be the predominant factor in a legislature's redistricting calculus is simple. Applying that principle, on the other hand, is quite complex, because numerous factors influence a legislature's districting choices and no one factor may readily be identified as predominant.

In undertaking this analysis, it is crucial to note that in the matter of redistricting, courts owe substantial deference to the legislature, which is fulfilling "the most vital of local functions" and is entrusted with the "discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915. We presume the legislature acted in good faith absent a sufficient showing to the contrary. *Id.* A state's redistricting responsibility "should be accorded primacy to the extent possible when a federal court exercises remedial power." *Lawyer v. Department of Justice*, 138 L. Ed. 2d 669, 680 (1997).

While the majority and I appear to be in agreement on those general principles, the majority does not discuss the extent of Plaintiffs' burden in proving a claim of racial gerrymandering. Concurring in *Miller v. Johnson*, Justice O'Connor emphasized that the plaintiff's burden in cases of this kind must be especially rigorous:

> I understand the threshold standard the Court adopts . . . to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in *substantial disregard* of customary and traditional districting practices. . . . [A]pplication of the Court's standard helps achieve *Shaw*'s basic objective of making *extreme instances* of gerrymandering subject to meaningful judicial review.

Miller, 515 U.S. at 928-29 (O'Connor, J., concurring) (emphasis added). This principle was recently developed by a three-judge panel that upheld Ohio's 1992 redistricting plan for its state legislature:

> As we apply the threshold analysis developed by the Supreme Court in *Shaw* cases, we are mindful of the dangers that a low threshold (easily invoking strict scrutiny) poses for states. We therefore follow Justice O'Connor's lead in applying a *demanding threshold* that allows states some degree of latitude to consider race in drawing districts.

Quilter v. Voinovich, 981 F. Supp. 1032, 1044 (N.D. Ohio 1997), *aff'd*, 66 U.S.L.W. 3639 (U.S. Mar. 30, 1998) (No. 97-988).

The Court has recognized that legislatures often have "mixed motives" -- they may intend to draw majority-minority districts as well as to protect incumbents or to accommodate other traditional interests. *Bush v. Vera*, 135 L. Ed. 2d at 257. In such a case, courts must review extremely carefully the evidence presented in order to determine whether an impermissible racial motive predominated. A determination that a state has relied on race in substantial disregard of customary and traditional districting practices will trigger strict scrutiny, though strict scrutiny does not apply merely because redistricting is performed with consciousness of race. *Id.* Plaintiffs may show that race predominated either through direct evidence of legislative intent or through circumstantial evidence, such as the extremely contorted nature of a district's shape and its racial demographics. *Shaw II*, 135 L. Ed. 2d at 218-219; *Miller*, 515 U.S. at 916.

The Plaintiffs have presented no direct evidence that the General Assembly's intent was to draw district lines based on race. In contrast to the redistricting plans at issue in North Carolina in *Shaw II*, in Texas in *Bush v. Vera*, and in Georgia in *Miller v. Johnson*, the 1997 Plan was not drawn with an articulated desire to maximize minority voting participation. In order to succeed on summary judgment, the Plaintiffs must therefore present circumstantial evidence that the State not only showed substantial disregard for traditional districting principles, but that the predominant factor in the legislature's decision to act as it did was race.

II.

The State has asserted that several criteria were more important than race in the General Assembly's creation of the 1997 Redistricting Plan. The General Assembly drew the 1997 Plan to remedy the constitutional violations in the 1992 Plan, to preserve North Carolina's partisan balance of six Republicans and six Democrats, and to avoid placing two incumbents in the same district. *See Defendants' Br. in Support of Sum-*

mary Judgment at 4-7 ("*Defendants' Br.*"). In order to grant Plaintiffs the relief they seek, they must prove that the state has substantially disregarded these proffered redistricting criteria, as well as other traditional districting criteria, in favor of race. I believe that the Plaintiffs have failed to meet this burden.

First and foremost, the districts at issue here are not majority-minority districts.[1] I find it of utmost importance that only 43.36% of the voting-age population in District 12 is African-American. This fact immediately distinguishes this case from the line of Supreme Court cases that have struck down racial gerrymandering in North Carolina, Florida, Georgia, Louisiana, and Texas -- cases that define the equal protection inquiry in this area. The Court itself recognized this distinction when it recently upheld a Florida state senate district

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[1] The Supreme Court has not articulated whether a district is designated majority-minority by reference to voting-age population, by reference to overall population, or by reference to voter registration. Voting-age population would seem to be the appropriate benchmark. All people of voting age have the capacity to influence elections, whereas those under voting age obviously cannot. Counting only registered voters would potentially undercount those with the potential to influence elections.

In District 12, 43.36% of the voting-age population is black, while 46.67% of the total population is black. In District 1, 46.57% Of the voting-age population is black, while 50.27% of the total population is black. Under none of the possible criteria, then, can District 12 be considered a majority-minority district. District 1 can only be considered a majority-minority district with reference to total population. *See Defendants' Br.* at 6.

that was not a majority-minority district. *See Lawyer*, 138 L. Ed. 2d at 680 (upholding state senate district with 36.2% black voting-age population); *see also Quilter v. Voinovich*, 66 U.S.L.W. 3639 (U.S. Mar. 30, 1998) (No. 97-988) (affirming decision of three-judge panel that rejected a racial gerrymandering challenge to Ohio legislative districts that were not majority-minority).

In its racial composition, District 12 is no different from every one of North Carolina's other eleven congressional districts: the majority of the voting-age population in the district is white. While this may not be dispositive of the question whether race was the predominant factor in the legislature's redistricting plan, the fact that all of North Carolina's congressional districts are majority-white at the very least makes the Plaintiffs' burden, which is already quite high, even more onerous. Had the legislature been predominantly influenced by a desire to draw District 12 according to race, I suspect it would have created a district where more than 43% of the voting-age population was black. In part because District 12 is not a majority-minority district, I find no reason to credit the Plaintiffs' contention that race was the predominant factor in the legislature's decisions. This is especially true considering that the legislature has proffered several compelling, non-racial factors for its decision.

Second, this case is readily distinguishable from previous racial gerrymandering case because the plan at issue

is not the result of North Carolina's acquiescence to pressure from the U.S. Justice Department, acting under its Voting Rights Act preclearance authority. In previous cases in which the Court struck down challenged districts, the legislatures drew the challenged plans after their initial plans had been denied preclearance by the Department of Justice under its "black-maximization" policy. *See Miller*, 515 U.S. at 921. For example, in *Miller*, the Court found that the creation of the unconstitutional district was in direct response to having had two previous plans denied preclearance by the Justice Department. *See id.* ("There is little doubt that the State's true interest in designing the Eleventh District was creating a third majority-minority district to satisfy the Justice Department's preclearance demands."). In *Shaw II*, the Court recognized that North Carolina decided to draw two majority-minority districts in response to the Justice Department's denial of preclearance to a previous plan. *Shaw II*, 135 L. Ed. 2d at 219 (noting that the "*overriding* purpose [of the redistricting plan] was to comply with the dictates of the Attorney General's Dec. 18, 1991 letter [denying preclearance to previous plan] and to create two congressional districts with effective black voting majorities") (quotation omitted).

In contrast, while the Department of Justice granted preclearance to the plan at issue in this case, the Department did not engage in the kind of browbeating that the Supreme Court has found offensive in previous racial gerrymandering cases. In the cases I have cited, the Court relied on this direct

evidence, that the legislature was primarily motivated by race, to invoke strict scrutiny of the challenged districts. Unlike those cases, Plaintiffs have proffered neither direct nor circumstantial evidence that the General Assembly was pressured by the Department of Justice to maximize minority participation when it redrew the congressional districts in 1997. In the absence of such evidence, I have little reason to believe that the State is less than candid in its averments to this court that race was not the predominant factor used by the legislature when crafting the 1997 redistricting plan.

In reaching its decision, the majority has relied heavily on evidence that District 12 could have been drawn to include more precincts where a majority of registered voters are Democrats, but that it was not so drawn, presumably for reasons that can be predominantly explained on no other basis but race. I cannot agree with the majority's interpretation of the evidence. The Plaintiffs, and the majority opinion, provide anecdotal evidence that certain precincts that border District 12, but were not included in that district, have a high number of voters that are registered Democrats. *See supra* at 8-9. This evidence does not take into account, however, that voters often do not vote in accordance with their registered party affiliation. The State has argued, and I see no reason to discredit their uncontroverted assertions, that the district lines were drawn based on votes for Democratic candidates in *actual elections*, rather than the number of registered voters. *See* Affidavit of Senator Roy A. Cooper, III ("Cooper Aff.") ¶8 ("election

results were the principal factor which determined the location and configuration of all districts").

The majority's evidence also ignores the simple fact that the redistricting plan must comply with the equal protection principle of "one person, one vote." Every voter must go somewhere, yet all districts must remain relatively equal in population. Plaintiffs' anecdotal evidence suggests that Democratic precincts could have been included in District 12 in certain areas, had the district only been enlarged to include those places. By necessity, however, the district would need to have been reduced in size in other places in order to accommodate the increase in the overall population in the district. Had the State drawn the lines in the manner that Plaintiffs' evidence implies it should have, it appears that the State simply would have traded a Democratic precinct in one part of the district for a Democratic precinct in another part. Perhaps such line-drawing would have satisfied the Plaintiffs' desire that District 12 contain more than a 57% white majority, but I do not agree with the majority that the Constitution requires it.

In contrast to Plaintiffs' anecdotal evidence (which is presented in an affidavit by Plaintiffs' counsel), the State has presented far more convincing evidence that race was not the predominant factor in the General Assembly's decision to draw District 12 as it has been drawn. *See* Affidavit of Dr. David W. Peterson ("Peterson Aff."). In his statistical analysis, Professor Peterson traveled the entire circumference of District 12,

looking at both the party affiliation and racial composition of the precincts on either side of the district line. Based on an analysis of the entire district, Professor Peterson concluded that "the path taken by the boundary of the Twelfth District can be attributed to political considerations with at least as much statistical certainty as it can be attributed to racial considerations." Peterson Aff. ¶3. In other words, examining the entire circumference of District 12, rather than relying on Plaintiffs' "pick and choose" examples, there is no statistical evidence to support the conclusion that race was the General Assembly's primary motive in drawing District 12.

Furthermore, the majority sees fit to ignore evidence demonstrating that not only did the legislature utilize traditional race-neutral districting principles in drawing the Twelfth District's lines, but that these principles predominated over any racial considerations. According to the Supreme Court, these "race-neutral" principles include, but are not limited to: compactness, contiguity, respect for political subdivisions or communities of interest, and incumbency protection. *See Bush v. Vera*, 135 L. Ed. 2d at 260; *Miller*, 515 U.S. at 916. The majority would apparently add "geographical integrity" to this list, although I am not clear what exactly they mean by that.[2]

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[2] The term "geographical integrity" does not appear in any of the Supreme Court's voting rights cases, and the only lower court case that expressly uses the term, *DeWitt v. Wilson*, 856 F. Supp. 1409, 1411 (E.D. Cal. 1994), did so only because it was a standard set out in the state's

(continued...)

See supra at 22. Regardless of what is included on the list, however, the fact remains that the legislature relied more heavily on these neutral principles than on race when it chose the boundaries of District 12.

The compactness of District 12 is, admittedly, substantially less than what has been deemed to be "ideal" and is the least compact of all of North Carolina's twelve congressional districts. *See supra* at 11 (citing Pildes & Niemi "compactness factors"). Some district, however, must inevitably be the least compact; that fact alone therefore is not dispositive. And because District 12 reflects the paths of major interstate highway corridors which make travel within the district extremely easy, it has a type of "functional compactness" that is not necessarily reflected by the Pildes & Niemi factors. In addition, District 12 as it currently stands is contiguous. Contrary to the majority's allusions to "narrow corridors," *see supra* at 7, the width of the district is roughly equal throughout its length, *see* Affidavit of Dr. Gerald R. Webster tbl. 1.

District 12 also was designed to join a clearly defined "community of interest" that has sprung up among the inner-cities and along the more urban areas abutting the interstate highways that are the backbone of the district. I do not see how anyone can argue that the citizens of, for example, the inner-

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[2] (...continued)
constitution.

city of Charlotte do not have more in common with citizens of the inner-cities of Statesville and Winston-Salem than with their fellow Mecklenburg county citizens who happen to reside in suburban or rural areas.

The tricky business of drawing borders to protect incumbents also required the legislature to draw District 12 in the way it did. District 12 had to be drawn in a manner that avoided placing both Congressman Burr's and Coble's residences inside the district, excluded Cabarrus County, where Congressman Hefner resides, and still provided enough Democratic votes to protect incumbent Congressman Watt's seat. *See* Cooper Aff. ¶10.

What I find to be the predominating factors in drawing the 1997 Plan, however, were the legislature's desire to maintain the 6-6 partisan balance in the House and to protect incumbents. *See* Cooper Aff. ¶ 8 (stating maintaining partisan balance was the principal factor driving redistricting). These are legitimate interests which have been upheld by the Supreme Court in previous voting rights cases, *see*, *e.g.*, *Bush v. Vera*, 135 L. Ed. 2d at 260-61, and were proper concerns for the legislature here. As I noted before, the majority's decision to look only at the percentage of registered Democrats in analyzing the district's borders ignores the fact that registered Democrats are not compelled to vote for Democratic candidates and often do not. In drawing District 12, therefore, the legislature did not consider merely the number of registered Demo-

crats, rather it looked also to the history of recent voting patterns in an attempt to design the districts to ensure that the partisan balance would remain stable. *See* Cooper Aff. ¶ 8; Peterson Aff. ¶ 21.

Finally, I find it highly unlikely, as the majority has found today, that the General Assembly acted with predominantly racial motives in its drawing of District 12, but did not act with the same motive in its drawing of District 1. The General Assembly considered the 1997 Redistricting Plan as a single, statewide proposal, and it makes little sense to me that the General Assembly would have been animated by predominantly racial motives with respect to the Twelfth District and not the First. This inconsistency is even more apparent when one considers that the legislature placed *more* African-Americans in District 1 (46.54% of the voting-age population) than in District 12. Since we all agree that the Plaintiffs have failed to prove any equal protection violation with respect to the legislature's decision in drawing District 1, I find it unlikely that Plaintiffs' proof would demonstrate otherwise with regard to other aspects of the same redistricting plan.

III.

Not only do I disagree with the majority in their holding the Twelfth District unconstitutional, I believe that -- even if the Twelfth District is unconstitutional -- they are in error in enjoining the current election process, which is already substantially underway. The rationale for allowing elections to proceed after a court has declared them to be constitutionally infirm has been clearly articulated by the Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 585 (1964):

> [O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of

> state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Weighing the equities here, it is clear that this is one of the "unusual" cases contemplated by *Reynolds v. Sims* and therefore an injunction should not be issued at this point in the election cycle.

On January 30, 1998, when the Plaintiffs filed their motion for a preliminary injunction to these elections, the deadline for candidates to file for the primary elections was only four days away. Voters had already contributed over $3 million to the congressional candidates of their choice, and the candidates themselves had spent approximately $1.5 million on their campaigns. *See* Second Affidavit of Gary O. Bartlett ("Bartlett Second Aff.") ¶ 14 (giving figures for the period from July 1 to December 31, 1997). Ballots have already been prepared, printed, and distributed. Absentee balloting for the primary elections began on March 16, 1998 and undoubtedly some voters have already cast their votes. The primary elections themselves are scheduled for May 5, only a few short

weeks away. This court's injunction therefore wreaks havoc on an electoral process that is in full swing.

An injunction puts the North Carolina legislature on the horns of a dilemma. It may choose to run the May 1998 elections as scheduled for everything but the congressional primaries, and then spend millions of dollars scheduling a separate election for the congressional primaries[3] -- an election for which few people are likely to make a special trip to the election booth. Or the State may decide to spend millions of dollars to reschedule the entire May election and affect hundreds of races for offices throughout the State. Forcing the State to choose between these two equally unpalatable choices is unreasonable.

In addition, the injunction will disrupt candidates' campaigning and voter contributions to those campaigns. Redrawing the Twelfth District's boundaries will inevitably change the boundaries of the surrounding districts, and the ripple effects of this redrawing may well affect many other districts in the State, as happened when the 1997 Plan supplanted the 1992 Plan. Congressional candidates cannot be certain whom they will represent or who their opponents will be until the districts are redrawn. Voters likewise will be unsure whether the candidates of their choice will end up in

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[3] The cost of a single, statewide election, primary or general, is said to be $4,300,000. *See* Bartlett Second Aff. ¶ 13.

their district. Not only will contributions to candidates and campaigning by candidates be slowed, if not halted, while the redistricting takes place, but once the redistricting is completed, candidates and voters will have scant time to become acquainted with each other before elections take place. *See McKee v. James*, CV-97-C-2078-W (N.D. Ala. March 24, 1998) (refusing to enjoin elections even though qualifying date for primary had not yet passed because "[s]ome energy is already invested; some persons have declared their candidacy to represent a certain districts. . . Even if redistricting were carried out today, it would disturb the expectations of candidates and their supporters, and it would disrupt the state's conduct of the primaries."); *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996) (refusing to issue injunction six weeks before general election when "[c]andidates have already spent significant time and money campaigning, and voters have begun to familiarize themselves with the candidates" because delay would disrupt elections unnecessarily and confuse voters). *Accord Vera v. Richards*, 861 F. Supp. 1304, 1351 (S.D. Tex. 1994), *affirmed sub nom. Bush v. Vera*, 135 L. Ed. 2d 245 (1996) (finding congressional districts unconstitutional eleven weeks before general elections but allowing them to proceed under unconstitutional apportionment plan). This will negatively affect the quality of the representation that citizens of North Carolina receive in Congress, and counsels against upsetting the current elections.

IV.

In its opinion, the majority concludes that neither the Plaintiffs nor the State has established the absence of a genuine issue of material fact that would entitle either party to judgment as a matter of law. *See supra* at 22-23. I believe that all material facts concerning the First District are uncontroverted -- this panel received the same evidence concerning District 1 as it did for District 12. If summary judgment is appropriate for District 12. I see no reason why District 1's constitutionality cannot be decided on summary judgment as well. The majority is simply wrong to require the State to establish the absence of an issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) ("[W]e do not think . . . that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact. . . ."). Because I believe that the Plaintiffs have failed to demonstrate that the First Congressional District under the 1997 Congressional Restricting [sic] Plan is an unconstitutional classification based on race, I would grant the State's motion for summary judgment.

V.

I agree with the majority that Plaintiffs have failed to meet their burden on summary judgment as to District 1, although I would go further and grant the State's motion for summary judgment as to this district. I dissent from the majority's

DISSENT, CONTINUED . . .

decision granting the Plaintiffs' motion for summary judgment on District 12, and enjoining elections under the 1997 Plan. For the reasons stated above, I would grant the State's motion for summary judgment, finding that Plaintiffs have not proven a violation of their right to equal protection of the laws.

ORDER AND PERMANENT INJUNCTION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 3, 1998

[Caption Omitted in Printing]

ORDER AND PERMANENT INJUNCTION

THIS MATTER is before the Court on Plaintiffs' motion for preliminary injunction, Plaintiffs' motion for summary judgment, and Defendants' motion for summary judgment.

Following a hearing on Tuesday, March 31, 1998, the Court took these motions under advisement and now issues the following ruling:

1) Finding that the Twelfth Congressional District under the 1997 North Carolina congressional redistricting plan is unconstitutional, the Court hereby GRANTS Plaintiffs' motion for summary judgment as to the Twelfth Congressional District.

2) Based upon the Court's finding that the Twelfth Congressional District is unconstitutional, it is further ORDERED that Plaintiffs' motion for a preliminary injunction and Plaintiff's request for a permanent injunction as contained in its complaint are GRANTED. Defendants are hereby ENJOINED from conducting any primary or general election for

congressional offices under the redistricting plan enacted as 1997 N.C. Session Laws, Chapter 11.

3) It is further ORDERED that the parties file a written submission no later than Wednesday, April 8, 1998, addressing the following issues:

a) An appropriate time period within which the North Carolina General Assembly may be allowed the opportunity to correct the constitutional defects in the 1997 plan, in default of which the Court would undertake the task.

b) A proposed election schedule to follow redistricting which provides for a primary election process culminating in a general congressional election to be held on Tuesday, November 3, 1998.

This order and permanent injunction are entered by a majority of the three-judge panel. Circuit Judge Sam J. Ervin, III, dissents. Memoranda with reference to this order will be issued as soon as possible.

THIS the third day of April, 1998.

/s/ Terrence W. Boyle
Chief United States District Judge

[Caption Omitted in Printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendants appeal to the Supreme Court of the United States from the April 3, 1998 final order of the three-judge district court declaring District 12 in North Carolina's 1997 Congressional Redistricting Plan unconstitutional and permanently enjoining the defendants from conducting any primary or general election under that plan.

This appeal is taken pursuant to 28 U.S.C. §1253.

NOTICE OF APPEAL, APRIL 6, 1998, CONTINUED . . .

This the 6th day of April, 1998.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Edwin M. Speas, Jr.
Senior Deputy Attorney General

/s/ Tiare B. Smiley
Special Deputy Attorney General

/s/ Norma S. Harrell
Special Deputy Attorney General

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
(919) 716-6900

[Certificate of Service Omitted in Printing]

JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 6, 1998

[Caption Omitted in Printing]

JUDGMENT

Decision by Court. This action came to trial or hearing before the Three Judge Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that the Court GRANTS Plaintiffs' motion for summary judgment as to the Twelfth Congressional District.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' motion for a preliminary injunction and Plaintiffs' request for a permanent injunction are GRANTED. Defendants are hereby **ENJOINED** from conducting any primary or general election for congressional offices under the redistricting plan enacted as 1997 N.C. Session Laws, Chapter 11.

JUDGMENT OF APRIL 6, 1998, CONTINUED . . .

THIS JUDGMENT FILED AND ENTERED ON APRIL 6, 1998 & COPIES TO:

Robinson Everett, Esq.
P.O. Box 586
Durham, NC 27702

Martin McGee, Esq.
P.O. Box 810
Concord, NC 28026 0810

Edwin M. Speas, Jr., Esq.
P.O. Box 629
Raleigh, NC 27602

April 6, 1998

DAVID W. DANIEL, CLERK
/s/ Jolie Skinner
(By) Deputy Clerk

AMENDED NOTICE OF APPEAL, APRIL 8, 1998

[Caption Omitted in Printing]

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Amended notice is hereby given that defendants appeal to the Supreme Court of the United States from the April 3, 1998 final order of the three-judge district court *and* the judgment entered April 6, 1998 declaring District 12 in North Carolina's 1997 Congressional Redistricting Plan unconstitutional and permanently enjoining the defendants from conducting any primary or general election under that plan.

This appeal is taken pursuant to 28 U.S.C. §1253.

AMENDED NOTICE OF APPEAL, CONTINUED . . .

This the 8th day of April, 1998.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Edwin M. Speas, Jr.
Senior Deputy Attorney General

/s/ Tiare B. Smiley
Special Deputy Attorney General

/s/ Norma S. Harrell
Special Deputy Attorney General

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(919) 716-6900

[Certificate of Service Omitted in Printing]

JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 14, 1998

[Caption Omitted in Printing]

JUDGMENT

Decision by Court. This action came to trial or hearing before the Three Judge Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Summary Judgment as to District 1 is DENIED.

THIS JUDGMENT FILED AND ENTERED ON APRIL 14, 1998 & COPIES TO:

Robinson Everett, Esq.
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Edwin M. Speas, Jr., Esq.
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Concord, NC 28026 0810

April 14, 1998

DAVID W. DANIEL, CLERK
/s/ Jolie Skinner
(By) Deputy Clerk

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ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 21, 1998

[Caption Omitted in Printing]

ORDER

This matter is before the Court on the parties' responses to the Court's April 3, 1998, Order which directed the Defendants to propose a schedule for redrawing the 1997 North Carolina Congressional Redistricting Plan (the "1997 plan") and for holding congressional primaries and general elections this year. Having considered the parties' arguments, the Court hereby ORDERS:

1. On or before Friday, May 22, 1998, the North Carolina General Assembly will enact legislation revising the 1997 plan and submit copies to the Court, along with indications with respect to any possible gubernatorial veto thereof. If the General Assembly does not revise the plan by that time, the Court will assume sole responsibility for drawing a plan. The General Assembly is directed to inform the Court immediately if prior to May 22, 1998, it becomes apparent that the two Houses of the General Assembly will be unable to agree on a plan. In that event, the Court will immediately assume responsibility for drawing an interim plan.

ORDER, CONTINUED . . .

2. Legislation revising the 1997 plan will be submitted to the Court for approval and to the United States Department of Justice for preclearance simultaneously.

3. Within three (3) business days of enactment of the new legislation, Plaintiffs will inform the Court in writing whether they will oppose the legislation or not, and, if they oppose the legislation, they will provide the basis for their objections in detail. Defendants will have three (3) business days to respond to any objections.

4. The 1998 congressional elections will be conducted under the new legislation if (1) the Court approves the new legislation, and (b) if the United States Department of Justice preclears the legislation by June 24, 1998. In the event the Department of Justice has not precleared the legislation by June 24, 1998, the Court will assume sole responsibility for an interim plan for the 1998 elections.

5. If the new enacted plan is not approved by the Court or sole responsibility to draw a plan falls to the Court, the Court will create an interim plan for the 1998 elections with a target completion date of July 1, 1998. This interim plan will also be used for the year 2000 election cycle, unless the North Carolina General Assembly enacts, in a timely manner, a new plan

ORDER, CONTINUED . . .

which is approved by the Court and precleared by the Department of Justice as appropriate.

6. The 1998 election process, whether conducted under a legislative plan or a court ordered plan, must begin no later than July 6, 1998, in order to hold the general election on November 3, 1998. The 1998 election schedule must contain the following elements:

Filing period
July 6 through July 20

Absentee balloting begins for primary
August 14

Primary
September 15

Absentee balloting begins for general election
October 2

General election
November 3

7. The North Carolina State Board of Elections is hereby ORDERED to implement the procedures necessary to comply with the above-listed 1998 election schedule.

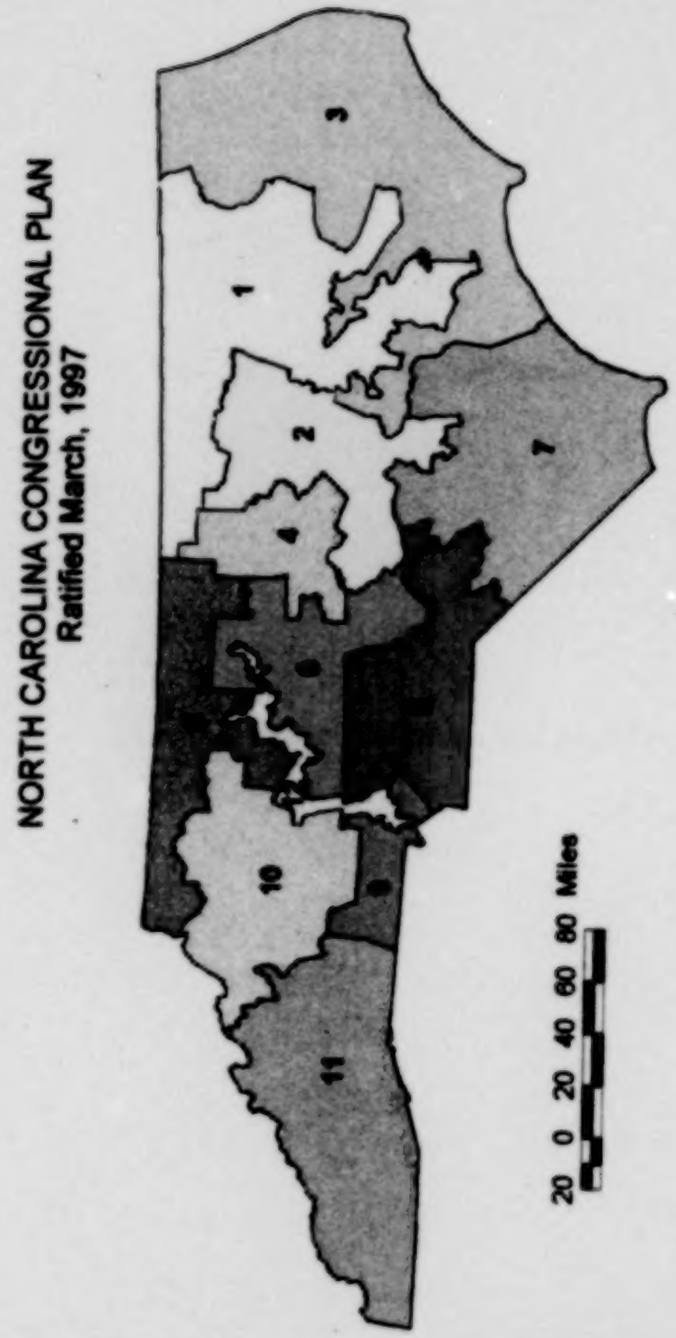
ORDER, CONTINUED . . .

SO ORDERED.

This the 20th day of April, 1998.

SAM J. ERVIN, III
United States Circuit Judge
TERRENCE W. BOYLE
Chief United States District Judge
RICHARD L. VOORHEES
United States District Judge

/s/ Terrence W. Boyle
Chief United States District Judge



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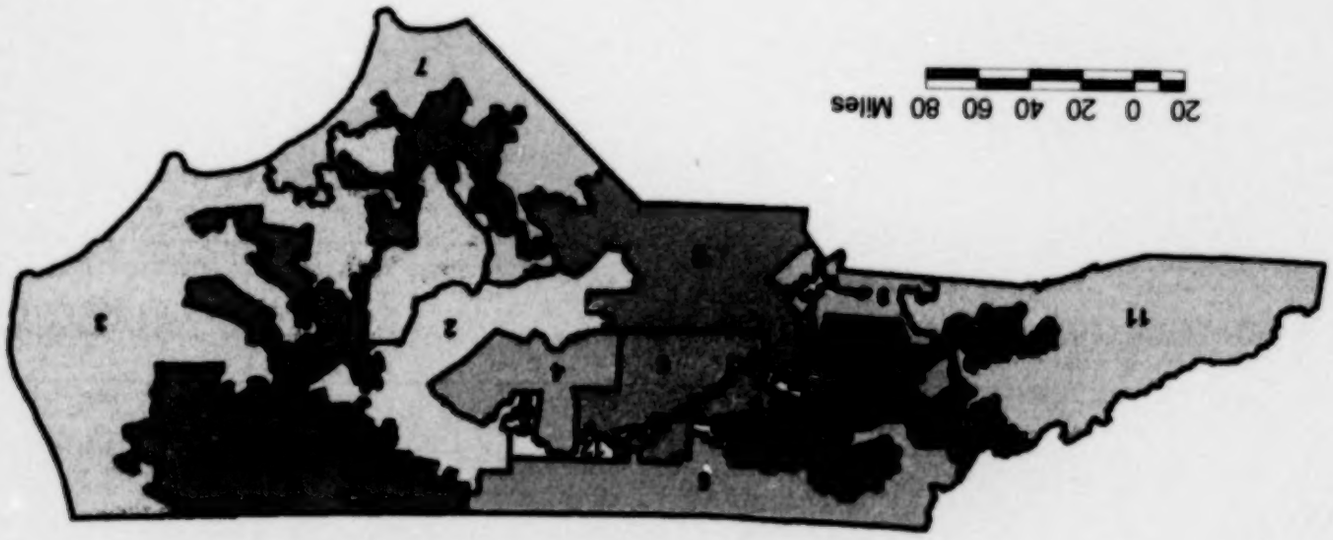
NORTH CAROLINA CONGRESSIONAL PLAN
Ratified January, 1992



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¶97C-27N OF THE SECTION 5 SUBMISSION COMMENTARY, AFFIDAVIT OF GARY O. BARTLETT (CD 47)

¶97C-27N. Effect of Change on Minority Voters

The General Assembly's primary goal in redrawing the plan was to remedy the constitutional defects in the former plan. Those defects were the predominance of race in the location and shape of District 12, and perhaps in the location and shape of District 1, and a failure of narrow tailoring. This goal was accomplished by emphasizing the following factors in locating and shaping the new districts: (1) avoidance of the division of counties and precincts; (2) avoidance of long narrow corridors connecting concentrations of minority citizens; (3) geographic compactness; (4) functional compactness (grouping together citizens of like interest and needs); and (5) ease of communication among voters and their representatives. Emphasis on these factors accomplished this goal. For example: (1) the unconstitutional plan divided 44 counties while the new plan divides only 22 counties; (2) the unconstitutional plan divided 6 counties among 3 districts while the new plan does not divide any county among 3 districts; (3) the unconstitutional plan divided 80 precincts while the new plan only divides 2 precincts; (4) the unconstitutional plan used "cross-overs," "double cross-overs" and "points of contiguity" to create contiguous districts while the new plan uses none of these devices; (5) District 12 in the unconstitutional plan was 191 miles long (in "traveling distance") while District 12 in the new plan is only 102 miles long; and (6) District 1 in the unconstitutional plan was 225 miles long while District 1 in the new plan is only 171 miles long. In addition, the new plan makes new District 12 a highly urban district by joining together citizens in the City of

¶97C-27N OF THE § 5 SUBMISSION COMMENTARY, CONTINUED . . .

Charlotte and the cities of the Piedmont Triad (Greensboro, Winston-Salem and High Point). Conversely, new District 1 is a distinctively rural district formed from the largely agrarian and economically depressed northeastern counties.

The General Assembly's other primary goal was to preserve the 6-6 partisan balance in the State's current congressional delegation. This balance reflects the existing balance between Democrats and Republicans in the State. The State House of Representatives is presently controlled by Republicans; the State Senate is presently controlled by Democrats; and most statewide elections are decided by narrow margins. It was clear from the beginning that the only plan the Senate and House would be able to agree on was one that preserved the existing 6-6 balance in the congressional delegation. At the same time, the chairmen of the Senate and House redistricting committees felt strongly that the legislature had a constitutional duty to draw a plan for the three-judge panel to review, rather than leave that task to the court. For these reasons, preservation of the existing partisan balance became a driving force in locating and shaping the districts.

These primary goals were accomplished while still providing minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12). Data and expert studies before the General Assembly provided a strong basis in evidence for the conclusion that the *Gingles* factors are present in the area generally encompassed by new District 1. *See* Attachment 97C-28F-3B and 97C-28F-3B Ex. Based on this evidence,

¶97C-27N OF THE § 5 SUBMISSION COMMENTARY, CONTINUED . . .

legislative leaders concluded that avoidance of potential liability under Section 2 of the Voting Rights Act probably required the creation of a majority-minority district in that area. Accordingly, 50.27% of the total population within the District is African-American and 46.54% of the voting age population projections indicate that the percentage of African-American, based on 1990 census data. In addition, 1997 population projections indicate that the percentage of African-Americans and the percentage of African-American registered to vote are slightly higher in District 1 today than in 1990. *See* Attachment 97C-28A-2. These percentages plus the "cross-over" voters within the District (20 to 25%) provide African-American citizens in District 1 a reasonable opportunity to elect a candidate of their choice. This opportunity is almost certainly enhanced for the life of this plan (the 1998 and 2000 elections) by the incumbency of Eva Clayton. Congresswoman Clayton was elected from old District 1 in 1992, 1994 and 1996 with percentages of 67.0% and 61.0% and 65.9%, respectively, even though African-Americans constituted only 53% of the District's voting age population and 50.5% of the District's registered voters.

The General Assembly did not have sufficient evidence to conclude, and believes that sufficient evidence does not exist to conclude, that *Gingles* factors exist in any other area of the State so as likely to require the creation of a second majority-minority district. In *Shaw* the Supreme Court specifically rejected the State's argument that it had a compelling interest in creating a majority-minority district in the area encompassed by old District 12. Likewise, the General Assembly

¶97C-27N OF THE § 5 SUBMISSION COMMENTARY, CONTINUED . . .

specifically rejected the creation of a second majority-minority district in the area eastward of Charlotte to Cumberland and Robeson Counties, as proposed for example by Senator Cochrane. Creation of any district in that area would artificially group together citizens with disparate and diverging economic, social and cultural interests and needs. It would sandwich rural voters between urban voters in the State's banking and commercial center at one end of the district and voters residing on and around Fort Bragg and Pope Air Force Base at the other end of the district. Such a district would also rely on uncertain coalitions between African-American and Native-American voters for its "majority-minority" status. Significantly, it would have thwarted the goal of maintaining partisan balance. Under these circumstances, voters could not obtain effective representation, or be effectively represented. Moreover, under these circumstances, race would have become the predominate factor, to the exclusion of the State's redistricting criteria, in the creation of a district which would bear an uncomfortable resemblance to Georgia's District 11 declared unconstitutional in *Miller v. Johnson*.

Nevertheless, District 12 in the State's plan also provides the candidate of choice of African-American citizens a fair opportunity to win election. Though not a majority-minority district, the candidate of choice of the minority community withing the District will have a fair and reasonable opportunity to win election based on a combination of minority and non-minority votes. Congressman Mel Watt was elected from old District 12 in 1992, 1994 and 1996 with percentages of 70.4%, 65.8% and 71.5%, respectively. (African-American

¶97C-27N OF THE § 5 SUBMISSION COMMENTARY, CONTINUED . . .

citizens constituted 53% of the voting age population and 53.5% of the registered voters of old District 12) Consistent with the General Assembly's primary goal to preserve the existing partisan balance in Congress, new District 12 contains a substantial portion of the core of the urban population of old District 12 and a substantial percentage of voters with an affinity for Democrat candidates, regardless of their race. Those factors, together with the significant African-American population in the District (46.67% total population and 43.36% voting age population) provide a fair opportunity for incumbent Congressman Watt to win election.

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AFFIDAVIT OF SENATOR ROY A. COOPER, III (WITHOUT ATTACHMENTS) (CD 47)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 4-96-CV-104-BO(3)

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, and GLENNES DODGE WEEKS,
Plaintiffs,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, et al.,
Defendants.

AFFIDAVIT OF ROY A. COOPER, III

Roy A. Cooper, III, being first duly sworn deposes and says:

1. I am a native of Nash County, North Carolina. After receiving my undergraduate and law degrees from the University of North Carolina at Chapel Hill, I returned home to

AFFIDAVIT OF SENATOR COOPER, CONTINUED . . .

Nash County where I have practiced law since 1982. A copy of my resume is attached to this affidavit.

2. In 1986, 1988 and 1990, I was elected to the North Carolina House of Representatives and in 1992, 1994 and 1996, I was elected to the North Carolina Senate. During the 1996 Session of the General Assembly, I served as Chairman of the Senate Judiciary Committee and the Senate Select Committee on Congressional Redistricting. I had not previously served on any redistricting committee.

3. My responsibility as Chairman of the Senate Redistricting Committee was to attempt to develop a new congressional plan that would cure the constitutional defects in the prior plan, and that would have the support of a majority of the members of the Senate, which was controlled by the Democrats, and the support of a majority of the members of the House, which was controlled by the Republicans. Under an order entered by the three-judge court in *Shaw v. Hunt,* the new plan had to be completed by March 31, 1997, to avoid the federal court imposing a plan on the State. The Senate's efforts to meet this responsibility are recorded in the transcripts of the meetings of the Senate Committee and of the debates on the floor of the Senate. A true and accurate copy of these transcripts is included in the North Carolina Section 5 Submission, 1997 Congressional Redistricting Plan (filed with the Affidavit of Gary O. Bartlett) as Attachments 97C-28F-4D(1)-(4).

4. Representative W. Edwin McMahan was appointed Chairman of the House Redistricting Committee by Speaker Brubaker. His responsibilities were essentially identical to mine.

5. Many people doubted that the General Assembly would be able to achieve a compromise between the Democratic controlled Senate and Republican controlled House. Redistricting generally is a task which becomes extremely partisan. Working with the leadership of the Senate and the House, however, Representative McMahan and I early on identified a single path by which a compromise might be reached and a new plan adopted. This path was to craft a plan which would cure the defects in the old plan and at the same time preserve the existing partisan balance in the State's congressional delegation. The Senate Redistricting Committee made the first attempt to travel down this path.

6. On February 20, 1997, after consultation with other Senate members, I presented a proposed plan, entitled Congressional Plan A (hereinafter Plan A), to the Senate Redistricting Committee. This plan was similar to alternative plans later proposed by the House Redistricting Committee and Representative McMahan and to the plan ultimately enacted by the General Assembly. Because Plan A turned out to be the prototype for the enacted plan, I will describe the goals the Senate leadership and I wanted to achieve in designing this plan. In addition, I will describe the process used to draw the

districts in Plan A to achieve those goals. Particular attention will be given to Districts 1 and 12.

7. We had two goals for the plan as a whole. The first goal was to cure the constitutional defects in the prior plan by assuring that race was not the predominate factor in constructing any district in the plan and to assure that traditional redistricting criteria were not subordinated to race. To accomplish this first goal, emphasis was placed on the following factors in constructing the plan: (1) avoidance of division of precincts; (2) avoidance of the division of counties when reasonably possible; (3) functional compactness (grouping together citizens of like interests and needs); (4) avoidance of long narrow corridors connecting concentrations of minority citizens; and (5) ease of communication among voters and their representatives. A comparison of the unconstitutional 1992 plan and Plan A demonstrates that this goal was accomplished. For example: (1) the unconstitutional plan divided 80 precincts while Plan A divided only 2 precincts (both of which were divided only to accommodate peculiar local circumstances); (2) the unconstitutional plan divided 44 counties while Plan A divided only 22; (3) the unconstitutional plan divided 7 counties among 3 districts while Plan A did not divide any county among 3 districts; (4) the unconstitutional plan used "cross-overs," "double cross-overs" and "points of contiguity" to create contiguous districts while Plan A used none of these devices.

8. Our second goal, and the goal that made it possible for the General Assembly to agree upon and enact a new plan, was to maintain the existing partisan balance in the State's congressional delegation, 6 Republicans and 6 Democrats. Based on my discussions with Senate leaders and with Representative McMahan, I knew that any plan which gave an advantage to Democrats faced certain defeat in the House while any plan which gave an advantage to Republicans faced certain defeat in the Senate. Preserving the existing partisan balance, therefore, was the only means by which the General Assembly could enact a plan as required by the Court. To achieve this pivotal goal, we designed Plan A to preserve the partisan core of the existing districts to the extent reasonably possible and to avoid pitting incumbents against each other. One tool I used to measure the partisan nature of districts was election results gathered and analyzed by the National Committee for an Effective Congress (NCEC). The NCEC information was based on the results of a series of elections from 1990 to 1996. I also used older election results contained in the legislative computer data base. In the end, these election results were the principal factor which determined the location and configuration of all districts in Plan A so that a partisan balance which could pass the General Assembly could be achieved.

9. The two goals we applied in drawing the plan as a whole were also applied in drawing Districts 1 and 12. To assure that race did not predominate over traditional

redistricting criteria, District 12 was drawn so that (1) only 1 precinct was divided (a precinct in Mecklenburg County that was divided in every local districting plan); (2) its length was reduced by 46% (from approximately 191 miles to 102 miles) so that it became the third shortest district in the state; (3) the number of counties included in the district was reduced from 10 to 6; (4) all "cross-overs," "double cross-overs" and "points of contiguity" were eliminated; and (5) it was a functionally compact, highly urban district joining together citizens in Charlotte and the cities of the Piedmont Urban Triad. To assure that race did not predominate over traditional redistricting criteria, District 1 was drawn so that (1) no precincts were split; (2) the number of counties included in the district was reduced from 28 to 20; (3) the number of divided counties included in the district was reduced from 18 to 10; (4) all "cross-overs," "double cross-overs" and "points of contiguity" were eliminated; (5) the length of the district was reduced by 24% (from approximately 225 miles to 171 miles); and (6) it was a functionally compact district joining together citizens in most of the rural and economically depressed counties in the northern and central Coastal Plain region of the State.

10. Maintaining Districts 1 and 12 as Democratic leaning districts was critical to achieving the pivotal goal of protecting the partisan balance in the State's congressional plan. Achieving this goal for Districts 1 and 12, however, presented special problems. First, the House insisted that

District 1 had to be drawn in a manner that protected Congressman Jones in District 3 and that avoided placing Congressman Jones' residence inside the boundaries of District 1. Second, District 12 had to be drawn in a manner that avoided placing Congressman Burr's and Coble's residences inside the boundaries of District 12. Third, District 12 had to be drawn in a manner that would not include Cabarrus County, Congressman Hefner's home county. Fourth, significant portions of Congressman Watt's and Congresswoman Clayton's former districts had been eliminated because of the directive in *Shaw v. Hunt*, thus lessening their strength as incumbents. Finally, we were concerned that Congressman Watt might lose some votes because of his race and that Congresswoman Clayton almost certainly would lose votes because of her race. To help protect District 1 as a Democratic leaning district, we included the heavy concentrations of Democratic voters in the cities of Rocky Mount, Greenville, Goldsboro, Wilson and Kinston, and to help protect District 12 as a Democratic leaning district, we included the heavy concentrations of Democratic voters in Charlotte, Greensboro and Winston-Salem in the district.

11. In developing Congressional Plan A, I also became convinced from expert studies before the General Assembly and my own knowledge and experience that Section 2 of the Voting Rights Act likely required the creation of a majority-minority district in the central to northern part of the Coastal Plain, where the largest concentration of black citizens

reside. *See* the attached map entitled, North Carolina Counties by Percent of Population Black, which illustrates the correlation between the boundaries of District 1 and this concentration of black citizens. That belief was balanced with my primary goals of curing the defects in our prior plan and protecting the existing partisan balance in the Congressional delegation in locating and drawing District 1 in Congressional Plan A.

12. On February 20, 1997, I presented Congressional Plan A to the Senate Redistricting Committee and on February 25, 1997, Representative McMahan presented his first plan, Congressional Plan A.1, to the House Redistricting Committee. Congressional Plan A and A.1 were similar. Based on NCEC election results, however, I was concerned that Representative McMahan's plan unnecessarily diminished Democratic performance in Districts 2, 8 and 12, Congressmen Hefner's, Etheridge's and Watt's districts.

13. Over the next several weeks, Representative McMahan and I were able to resolve my concerns and the concerns of the Senate leadership by negotiation. The compromise we reached finally was reflected in a plan entitled "97 House/Senate Plan." This is the plan that was enacted by the General Assembly on March 31, 1997. The first plan, "Congressional Plan A," and "97 House/Senate Plan," the enacted plan, are very similar. One of the differences is that the

first plan had 24 divided counties while the enacted plan reduced the number of divided counties to 22.

14. The "97 House/Senate Plan" is a negotiated bipartisan plan which contains districts located and shaped in a manner to avoid constitutional problems and to protect the existing partisan balance in the State's Congressional delegation. Racial fairness was, of course, considered in the development of the plan. Our obligations to represent all of our constituents of all races and to comply with the Voting Rights Act demanded that racial fairness be considered. The plan enacted is racially fair, but race for the sake of race was not the dominate or controlling factor in the development or enactment of the plan. In drawing initially Congressional Plan A and in negotiating the eventually enacted plan, partisan election data, not race, was the predominant basis for assigning precincts to districts including precincts in Districts 1 and 12. That a large proportion of precincts assigned to District 12 have significant black populations is simply the result of a strong Democratic voting pattern among blacks. Moreover, District 12 is not even composed of a majority of black citizens; it is a district in which white citizens constitute 52% of the district's total population, 55% of the districts' voting age population and 54% of the districts' registered voters. Simply, District 12 is a Democratic island in a largely Republican sea.

This the 25th day of February, 1998.

/s/ Roy A. Cooper, III

Sworn to and subscribed before me this
25th day of February, 1998.

/s/ Beverly Adams
Notary Public

My commission expires: 1/24/2000

AFFIDAVIT OF REPRESENTATIVE W. EDWIN MCMAHAN (WITHOUT ATTACHMENT) (CD 47)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 4-96-CV-104-BO(3)

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, and GLENNES DODGE WEEKS,
Plaintiffs,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, et al.,
Defendants.

AFFIDAVIT OF W. EDWIN MCMAHAN

W. Edwin McMahan, being first duly sworn, deposes and says:

1. I am a native of Buncombe County, North Carolina and have resided in Charlotte, North Carolina since 1974. A copy of my resume is attached.

AFFIDAVIT OF REPRESENTATIVE MCMAHAN, CONTINUED . . .

2. In 1994 and 1996, I was elected to the North Carolina House of Representatives. During the 1997 Session of the General Assembly, Harold J. Brubaker, Speaker of the House, appointed me to serve as Chairman of the House Congressional Redistricting Committee. I had no previous involvement in congressional redistricting.

3. My responsibility as Chairman of the House Redistricting Committee was to attempt to develop a new congressional plan that would cure the constitutional defects in the prior plan, and that would have the support of a majority of the members of the Senate, which was controlled by the Democrats, and the support of a majority of the members of the House, which was controlled by the Republicans. Under an order entered by the three-judge court in *Shaw v. Hunt*, that task had to be completed by March 31, 1997, to avoid the federal court imposing a plan on the State.

4. Senator Roy A. Cooper, III, was appointed Chairman of the Senate Redistricting Committee by President Pro Tem Marc Basnight. His responsibilities were essentially identical to mine.

5. Many people doubted that the General Assembly would be able to achieve a compromise between the Democratic controlled Senate and Republican controlled House on the most partisan legislative task, redistricting. Working

with the leadership of the Senate and the House respectively, however, Senator Cooper and I early on identified a single path by which a compromise might be reached and a new plan adopted. This path was to craft a plan which would cure the defects in the old plan and at the same time preserve the existing partisan balance (6 Republicans and 6 Democrats) in the State's congressional delegation.

6. To cure the constitutional defects in the prior plan, we had to be sure that traditional redistricting criteria were not subordinated to race. To achieve this goal, the leadership of the House and I wanted to avoid splitting any precincts, to avoid splitting counties when reasonably possible, to eliminate all of the "cross-overs," "double cross-overs" and "points of contiguity" from the prior plans, to facilitate communication among voters in a district and their representatives in Congress, and to place citizens with similar needs and interests in the same districts to the extent reasonably possible.

7. To protect the existing partisan balance, the leadership of the House and I recognized that we would need to protect incumbents and to preserve the cores of the prior districts to the extent consistent with our goal of curing the defects in the prior plans. The means I used to check on the partisan nature of proposed new districts was the election results in the General Assembly's computer data base (the 1990

Helms-Gantt election and the 1988 elections for Lieutenant Governor and one of the Court of Appeals seats). I also used more recent election results to evaluate the proposed Districts 2 and 4 -- the districts that we felt were the most competitive from a partisan viewpoint.

8. On February 20, 1997, Senator Cooper presented Congressional Plan A to the Senate Redistricting Committee and on February 25, 1997, I presented Congressional Plan A.1, to the House Redistricting Committee. Congressional Plan A and A.1 were similar.

9. Over the next several weeks Senator Cooper and I were able to resolve the few differences between the two plans. The compromise we finally reached is reflected in a plan entitled "97 House/Senate Plan A." This is the plan that was enacted by the General Assembly on March 31, 1997. It achieves the goals the leadership of the House and I had. It cures the constitutional defects in the prior plan and it protects the existing partisan balance in the State's Congressional delegation. The plan also meets one-person, one-vote requirements and, with regard to District 1, meets Voting Act requirements.

10. 97 House/Senate Plan A is not an unconstitutional racial gerrymander. 97 House/Senate Plan A is a negotiated bipartisan plan which contains districts located

and shaped in a manner to avoid constitutional problems and to protect the existing partisan balance in the State's Congressional delegation. Racial fairness was, of course, considered in the development of the plan. Our obligations to represent all of our constituents of all races and to comply with the Voting Rights Act demanded that racial fairness be considered. The plan enacted is racially fair, but race for the sake of race was not the dominate or controlling factor in the development or enactment of the plan. The dominate and controlling factors in developing the plan were (1) curing the constitutional defects in the prior plan and (2) protecting the existing partisan balance. Two indications that race was not dominate in drawing the plan are the fact that 12 of the 17 members of the House who are black voted against 97 House/Senate Plan A and the fact that two black members of the House, Representatives Fitch and Michaux, have claimed that the plan we enacted is not racially fair to blacks.

11. The efforts by the House of Representatives to meet their responsibilities in enacting a new congressional redistricting plan are recorded in the transcripts of the meetings of the House Redistricting Committee and the debate on the floor of the House. A true copy of these transcripts is included in the North Carolina Section 5 Submission, 1997 Congressional Redistricting Plan (filed with the Affidavit of Gary O. Bartlett) as Attachments 97C-28F-4E(1) through 97C-28F-4F(1).

This the 26th day of February, 1998.

/s/ W. Edwin McMahan

Sworn to and subscribed before me this
26th day of February, 1998.

/s/ Frances S. Carraway
Notary Public

My commission expires: 12/20/99

AFFIDAVIT OF DAVID W. PETERSON, PHD (WITHOUT ATTACHMENT) (CD 47)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 04-CV-104-BO(3)

MARTIN CROMARTIE, et al.	)
	)
v.	)
	)
JAMES B. HUNT, JR. in his capacity as Governor, et al.	)

AFFIDAVIT OF DAVID W. PETERSON, PHD

DAVID W. PETERSON, PHD, being duly sworn, deposes and declares the following:

Identity

1. I am president of PRI Associates, Incorporated, a company whose chief activity is providing statistical litigation support. I am also recently retired as Adjunct Professor in the Institute of Statistics and Decision Sciences at Duke University, Durham, North Carolina, where for more than twenty years I taught courses in the theory and application of statistics. I am co-author of a book entitled *Use of Statistics in Equal*

AFFIDAVIT OF DR. PETERSON, CONTINUED . . .

Employment Opportunity Litigation, the guest editor of a special issue of the journal *Law and Contemporary Problems* devoted to statistical inference in litigation, and the contributor of a chapter to each of two other books on the use of statistics in litigation. I have testified as an expert statistical witness in more than thirty cases in federal district courts around the nation, including the Eastern District of North Carolina, and worked with legal teams as a statistical expert in more than two hundred different cases. I have testified for and advised defendants as well as plaintiffs.

Assignment

2. I am retained in this matter by the defendant to examine the statistical relationship between the boundary of North Carolina's Twelfth Congressional District as created by the North Carolina General Assembly on March 31, 1997 and the racial and political makeup of the residents in that District and the surrounding area. In particular, I am asked to determine the extent to which political affiliation might explain as well as, or better than, race the boundary of District Twelve. Most particularly, I am asked to determine whether, based on the statistical pattern of association relating the boundary of the Twelfth District and the racial and political makeup of nearby residents, race appears to have been the predominant factor in defining that boundary.

Conclusions

3. Based on an examination of the data available to me, I conclude that

a. There is a substantial correlation between the path taken by the boundary of the Twelfth district and the political preferences of the residents of the precincts touching that boundary, the tendency being to include precincts within the District which have relatively high Democratic party representation.

b. There is also a substantial correlation between the path taken by the boundary of the Twelfth District and the racial composition of the residents of the precincts touching that boundary, the tendency being to include precincts within the District which have relatively high black representation.

c. Because the correlation found in a. is as large or larger than that found in b., it follows that the path taken by the boundary of the Twelfth District can be attributed to political considerations with at least as much statistical certainty as it can be attributed to racial considerations. In other words, there is no statistical indication that race was the predominant factor determining the border of the Twelfth District; there is at least one other explanation that fits the data as well as or better than race, and that explanation is political identification.

d. There is a substantial correlation, precinct by precinct, between the fraction of a precinct's residents who are black and the fraction who favor the Democratic political party over the Republican.

e. Among the few border precincts where the above correlation does not exist, the boundary of the Twelfth District appears to have been drawn at least as much with the purpose of creating a Democratic majority within the District as with creating a black majority.

f. I also determined that blacks constitute less than half of the residents of District Twelve, and that people who identify more strongly with the Democratic Party than the Republican Party constitute more than half the residents of that District. This lends further credence to conclusions c. and e., above.

Underlying Data

4. The information on which my conclusions rest consists primarily of the computerized data base used by the North Carolina Legislature to draw the boundaries of districts under challenge in this lawsuit. This file permitted me to determine, precinct by precinct,

a. the number of residents therein by racial category, according to the 1990 US census,

b. the number of voting age residents therein by racial category, according to the 1990 US census,

c. the number of registered voters therein, by racial category, according to local voter registration records,

d. the number of people who voted for each major candidate in the 1988 Court of Appeals election,

e. the number of people who voted for each major candidate in the 1988 Lieutenant Governor election,

f. the number of people who voted for each major candidate in the 1990 Helms - Gantt US Senatorial election, and

g. the number of registered voters by political affiliation.[1]

I also relied on numerous maps of North Carolina supplied to me by the State, showing the boundaries of the Districts and the identities of the precincts bordering them.

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[1] In 69 of the State's 100 counties, these counts can be inferred for each precinct within the county. For the remaining 31 counties, precinct level information is not available so we used Minor Civil Divisions instead. Of the nine counties touching or included in the Twelfth District, only Davie County is among the 31 counties not having precinct level information.

Analysis: Correlation of Race with Party Affiliation

5. Using the data file described above, I calculated for each of the North Carolina precincts the following seven percentages:

a. the percentage of the resident population who are black,[2]

b. the percentage of the voting age population who are black,

c. the percentage of the registered voters who are black,

d. the percentage of the voters who voted for the Democratic candidate in the 1988 Court of Appeals election,

e. the percentage of the voters who voted for the Democratic candidate in the 1988 Lieutenant Governor election,

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[2] Nearly all of the racial minority people living in the vicinity of the Twelfth District are black. I have repeated all of the analyses described in this affidavit using all minorities in lieu of blacks, and the results are identical in all material respects.

f. the percentage of the voters who voted for the Democratic candidate in the 1990 Helms - Gantt US Senate election, and

g. the percentage of the voters who are registered as Democrats.[3]

6. I then plotted each of the State's 2217 precincts on a graph, based on its registered voter black percentage (5c above) and its registered voter Democratic percentage (5g above). The result is Chart 1. This chart, which looks like an inverted tornado, displays a strong correlation between racial composition and party preference. It shows that in precincts with high black representation, there is a correspondingly high tendency for voters to favor the Democratic Party. In precincts with low black representation, there is much more variation in party preference, and the fraction of registered voters favoring Democrats is substantially lower.

7. Virtually the same picture emerges when one includes in Chart 1 just the six counties through which District Twelve runs; and the picture is again much the same when one

[3] In calculating each of these four party affiliation percentages, I included only people who were identified with one of the two major parties. Hence, a precinct that by one of these measures is "42% Democratic," it is in the same sense "58% Republican."

includes just the nine counties touched by the Twelfth District.[4] This collection of charts is the basis for my conclusion that there is a substantial correlation between the black representation within a precinct and the proportion of its residents who favor the Democratic Party.

Analysis: Correlation of Boundary with Race and Political Party

8. The basic geographic unit used by the legislature in constructing districts is the precinct. (There are some instances in which county boundaries are used, but even these are also precinct boundaries.) To examine the correlation of the Twelfth District boundary with the race of people living along its path, I identified each of the precincts that touch the boundary, and divided the boundary into segments each of which separates one precinct inside the District from the one just outside. There are 234 such segments, each of which reflects a decision made by the legislature about the path taken by the Twelfth District border.[5] For each segment, I then determined whether the representation of blacks is greater in

[4] I have created analogous charts using the other measures of racial composition and party affiliation defined in paragraph 5, and they too do not differ materially from Chart 1.

[5] Among the border precincts, three have no registered voters. These precincts touch five boundary segments, which are necessarily excluded from correlation calculations based on measures 5c through 5g.

the inside precinct than it is in the outside precinct, using each of the three measures 5a, 5b and 5c.

9. If, for each segment, the representation of blacks were greater in the inside precinct than the outside precinct, then the correlation between the path taken by the border and the racial makeup of the precincts around which it travels would be perfect. On the other hand, were only half of the segments of this type, there would be no correlation at all between the path taken by the border and the racial composition of the precincts it separates.[6] The actual results fall about halfway between these extremes, as follows:

Black Population (5a)	79.1%
Black Voting Age Population (5b)	79.9%
Black Registered Voters (5c)	79.5%

10. It is evident from these figures that there is some positive correlation between the path taken by the border of the Twelfth District and the racial composition of the local residents. It is also clear that the correlation is not perfect.

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[6] If none (0%) of the segments had this property, there would once again be perfect correlation between the boundary line and the racial makeup along its path, but in the sense that the boundary tends to exclude blacks from the Twelfth District.

11. Similarly, I noted for each of the 234 segments constituting the border of the Twelfth District whether the representation of Democrats was greater in the inside precinct than in the outside precinct. If 100% of the segments had this property, the border would correlate perfectly with party preference, while if only half had the property, there would be no correlation at all. The actual results, for each of the four party preference measures, are midway between these extremes, as follows:

1988 Court of Appeals Election (5d)	80.8%
1988 Lt Governor Election (5e)	78.6%
1990 Helms - Gantt Election (5f)	80.8%
Registered Voters (5g)	84.3%

12. Evidently, there is some positive correlation between the path taken by the border of the Twelfth District and the party preferences of the local residents, though the correlation is not perfect.

13. Comparing the numerical results from paragraphs 9 and 11 above, it is apparent that there is at least as much correlation between the border of the Twelfth District and the party preferences of the local residents as there is between the border and the racial composition of those residents. That is, the statistical evidence supporting party affiliation as an important determinant of the boundary is at least as strong, and marginally stronger, than the statistical evidence supporting

race as an important determinant of the boundary of the Twelfth District.

Analysis: Divergent Boundary Segments

14. As might be expected from the correlation (paragraphs 6 and 7 above) between party affiliation and racial composition within precincts, there are many District Twelve border segments in which not only is the representation of blacks higher in the inside precinct than in the outside, so too is the representation of people favoring the Democratic Party. Such segments (which I call "convergent") support equally the proposition that

a. the motivation for the District Twelve boundary was at least in part to maximize black representation within the District (the "Race Hypothesis"),

and the proposition that

b. the motivation was at least in part the maximization of Democratic Party affiliation (the "Political Hypothesis").

Clearly, convergent segments do not help us determine which of these two propositions is more likely.

15. There is a second type of convergent segment, namely a border segment for which the representation of blacks is greater in the outside precinct than in the inside and for which the representation of Democrats is also greater outside than inside. For the same reason noted above, this type of convergent segment also tells us nothing about which of the two aforementioned propositions is the more likely.

16. Only the boundary segments which are divergent, *i.e.*, those for which

a. the representation of blacks on the inside is greater than that on the outside and for which the representation of Democrats is greater on the outside than on the inside ("Type R" boundary segments),

or, alternatively, for which

b. the representation of blacks on the outside is greater and the representation of Democrats on the inside is greater ("Type P" boundary segments),

can indicate which of the above two propositions is more likely.

17. Evidently, a Type R divergent boundary segment favors the Race Hypothesis over the Political Hypothesis, while

a Type P segment favors the Political Hypothesis over the Race Hypothesis.

18. Depending on the measures used to determine racial representation and Democratic party preference, a given boundary segment may or may not be divergent. I have examined all possible combinations of the three racial measures (5a, 5b and 5c) and the four party preference measures (5d, 5e, 5f and 5g), resulting in twelve different ways to determine whether a boundary segment is divergent.

> For example, using the two measures (5c and 5g) based on registered voters, there are 41 divergent boundary segments. Of these, 26 are of Type P, namely ones for which the representation of blacks is greater on the outside than on the inside, yet the representation of Democrats is greater on the inside than on the outside. The remaining 15 divergent segments are of Type R: the representation of blacks is greater on the inside than on the outside, yet the representation of Democrats is greater on the outside. Evidently, the balance here tips in favor of the Political Hypothesis by a score of 26 divergent segments to 15: it is more likely that of the two propositions, party affiliation was the driving force rather than race.

19. Of the total of twelve such analyses,

a. seven result in a pattern of divergent boundary segments favoring the Political Hypothesis over the Race Hypothesis, in the sense just described,

b. three result in a pattern favoring the Race Hypothesis over the Political Hypothesis, and

c. two result in a pattern equally strong in support of both hypotheses.

It is clear from these analyses that the statistical support for the Political Hypothesis is at least as strong as that for the Race Hypothesis, and, indeed, somewhat stronger.

20. As indicated above, some boundary segments are divergent when judged by one pair of measures of race and party preference, but not divergent when judged by another. There are, however, ten boundary segments that are divergent by every one of the twelve combinations of race and party affiliation measures. Of these ten unequivocally divergent boundary segments,

a. six support the Political Hypothesis, while

b. four support the Race Hypothesis.

Again, the statistical support for the Political Hypothesis is at least as strong as that for the Race Hypothesis, and indeed, slightly stronger.

21. Finally, the representation of blacks in the Twelfth District by each of the three measures used herein is:

Black Population (5a)	47%
Black Voting Age Population (5b)	43%
Black Registered Voters (5c)	46%

By none of these measures do blacks constitute a majority of the people in the Twelfth District. Similarly, the representation of Democrats in the Twelfth District by each of the four measures used herein is:

1988 Court of Appeals Election (5d)	62%
1988 Lt Governor Election (5e)	62%
1990 Helms - Gantt Election (5f)	66%
Registered Voters (5g)	75%

By every one of these measures, Democrats constitute a majority of the people in the Twelfth District. These figures support the proposition that creation of a Democratic majority in District Twelve was a more important consideration in its construction than was the creation of a black majority.

Further the Affiant Saith Naught.

/s/ David W. Peterson, PhD

Subscribed and sworn to before me
this 27th day of February, 1998.

/s/ Peter R. Shalak
Notary Public

My Commission Expires: 1-16-2002

AFFIDAVIT OF DR. ALFRED W. STUART (WITHOUT ATTACHMENTS) (CD 47)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

Civil Action No. 4-96-CV-104-BO(3)

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, and GLENNES DODGE WEEKS,
Plaintiffs,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, et al.,
Defendants.

AFFIDAVIT OF DR. ALFRED W. STUART

Alfred W. Stuart, being first duly sworn, deposes and says:

1. I am a Professor of Geography at the University of North Carolina at Charlotte, where I have been on the faculty

AFFIDAVIT OF DR. STUART, CONTINUED . . .

since 1969. For 17 of those years I served as Chairman of the Department of Geography and Earth Sciences. I earned a BS degree from the University of South Carolina, an MS from Emory University and my PhD from Ohio State University.

2. My professional work has focused on economic and demographic change in the Charlotte urban region, North Carolina and the rest of the South. This work has found primary expression in a number of atlas-style publications. These publications were a collaborative effort with a number of colleagues in which patterns and trends have been articulated in a substantive text and illustrated with appropriate maps, charts and photographs. The atlas for the state of North Carolina was published by the University of North Carolina Press in 1975. It received wide critical acclaim and served as a model for other regional atlases that were published in Michigan, Oregon, Georgia and other states. A revision of that book is now underway and it is expected to be published by the UNC Press in 1999. Other atlas-style books which I have helped edit and author include a series on the urban regions of North Carolina and a 1989 work, *Land of the South*, that portrayed growth and change in the major sub-regions of the South. All of these books were prepared in such a way as to make the information accessible to lay readers, as a means of helping them make more informed decisions about their state and communities. A copy of my curriculum vitae is attached.

3. I was asked by representatives of the Attorney General's Office to replicate for the 1997 congressional plan an analysis I prepared in the *Shaw* litigation which compared the driving times and distances of the twelve congressional districts in the 1992 plan. My analysis is contained in this affidavit.

4. The primary means that is used by persons moving around within a congressional district in North Carolina is the personal automobile. For this reason, one of the more significant measures of intra-district interaction and information exchange is the degree of highway accessibility from one end of a district to another. For purposes of this analysis, average driving time also was computed since it is probably a greater concern for most people than mileage.

5. Access by highway is a function of both the size and shape of a district but especially of the nature of the highway network that covers it. To illustrate this point, points were selected within each district that are identifiable on a highway map and which approximate maximum distances across the district. In several cases (Districts 1, 3 and 7) where the distance appears to be about the same length in several directions, several pairs of points were selected. These pairs of points were entered into a sophisticated computer model that contained a data base of the entire highway network for North Carolina and also information on the characteristics of the roads (number of lanes, etc.) and speed limits. A TransCAD (version 2.1) software designed especially for highway studies

was used to make the analysis. The computer model chose the route or routes that represented the minimum travel time between the selected end points. It also provided the mileage of each selected route. These travel times and distances are summarized in Table 1 in the Appendix. Maps included in the Appendix outline each of the routes.

6. The travel times that were calculated by the computer program reflect average driving times in an automobile. No allowances were made for possible rush hour traffic congestion or for stopping en route. Such factors as driving at speeds other than the legal speed limits would modify the actual driving times. The point of these calculated times was not to estimate actual times but to make estimates for each route on the same basis in order to provide objective figures for comparative purposes. Small differences in times should not be taken too seriously but greater differences are meaningful.

7. The shortest travel time and distance (1.26 hours and 64 miles) for all of the 1997 congressional districts was that calculated for the relatively compact District 9, the route for which follows primarily I-85 and some of U.S. 74. In addition, Districts 4, 6 and 12 also have travel times of less than two hours and distances of less than 100 miles. In contrast, District 3, on each of two routes, has the longest paths because of the size of the district and the nature of the road network. The routes begin on the elongated Outer Banks and

go either west or south. Representative of the best highways through the district is U.S. 17, which is not an Interstate. Both routes are estimated to take over four hours and are close to or more than 200 miles long. The other longest travel times and routes are in Districts 1 and 11. The times and distances for Districts 1, 3 and 11 reflect the relative geographic size of the districts which results from the dispersion of the population in these more sparsely populated areas of the state.

8. Of all twelve congressional districts, District 12 has the third shortest travel time (1.67 hours) and third shortest distance (95 miles) between its farthest points. For purposes of intra-district interaction and information exchange, District 12 is a highly accessible district by highway and is therefore compact in the sense of travel time and distance for a congressional representative.

9. In the *Shaw* litigation, I submitted a report analyzing the time and travel distances for the districts in the 1992 congressional plan using the same computer model. The times and distances are summarized in Table 2 in the Appendix. Also included in the Appendix is a map of these routes.

10. The average travel time for the 1992 districts was 2.65 hours, ranging from a low of 1.34 hours (District 10) to a high of 4.77 hours (District 1). The average distance for the 1992 districts was 141.1 miles, ranging from a low of 57.1

miles (District 10) to a high of 271 miles (District 1). District 12, although only slightly above average for time and distance (2.97 hours and 162.4 miles) ranked in the bottom one-third for time and distance.

11. The average travel times and distances for the 1997 congressional districts do not differ significantly from the 1992 districts: the average travel time remains at 2.65 hours, while the average distance is slightly shorter at 130.6 miles. However, the travel times for District 12 have improved dramatically, moving to a number three ranking in terms of shortest time and distance.

12. At the request of the Attorney General's office, I did an analysis of the population growth in North Carolina's congressional districts. A true copy of that report is attached hereto and incorporated by reference.

This the 23rd day of February, 1998.

/s/ Alfred W. Stuart, PhD

Sworn to and subscribed before me
this 23rd day of February, 1998.

/s/ Frances S. Carraway
Notary Public
My commission expires: 12-20-99

"AN EVALUATION OF NORTH CAROLINA'S 1998 CONGRESSIONAL DISTRICT" BY PROFESSOR GERALD R. WEBSTER (WITHOUT MAPS) (CD 47)

An Evaluation of North Carolina's
1998 Congressional Districts
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I am a Professor of Geography at the University of Alabama, Tuscaloosa, Alabama, where I have been employed for the past nine years. My formal education includes a BA (1975) in political science from the University of Colorado-Denver, a MS (1980) in geography from Western Washington University, and a Ph.D. (1984) in geography from the University of Kentucky. My primary research and teaching emphases are in political geography, and range in topical focus from the local to international scales. My research has most emphasized topics in electoral geography including the issue of redistricting. I have authored over 50 publications including more than 30 in refereed journals on varied topics including redistricting. At present I am the co-editor or co-author of three forthcoming books on topics in political geography including one on redistricting to be published by Syracuse University Press. Between 1995 and 1997 I served as the Chair of the

DR. WEBSTER'S REPORT, CONTINUED . . .

Political Geography Specialty Group, Association of American Geographers, the largest organization of political geographers in the world. My Vita accompanies this report.

On December 9, 1997, I met with representatives of the North Carolina Attorney General's Office and was asked to evaluate the state's twelve congressional districts intended for use in the 1998 elections (hereafter referred to as the "1998 districts"). For this purpose I was provided maps of the 1992-1996 (hereafter referred to as the "1992 districts") and 1998 districts, and access to data from Election Data Services, one of the country's most prominent providers of data on elections and districts. From Election Data Services I secured the majority of the compactness indicators used in this report, and shape files of the congressional districts in selected states including North Carolina.

The purpose of this report is to evaluate the twelve congressional districts now in place for the 1998 elections (Figure 1). Where pertinent, these districts are compared to the 1992 districts (Figure 2). This report uses a set of traditional districting criteria on which to base its evaluation. Basic background reading on these criteria is found in the published work of Professor Richard Morrill (Department of Geography, University of Washington), and Professor Bernard Grofman (School of Social Sciences, University of California, Irvine).

Professor Morrill is a political geographer and the foremost geographic authority on districting procedures in the United States today. His 1981 monograph, *Political Redistricting and Geographic Theory*, includes a chapter entitled "Criteria for Redistricting" which is cited in this report. Professor Grofman is a political scientist and is among the most recognized authorities from that discipline on redistricting issues. Professor Grofman's "Criteria for Districting: A Social Science Perspective" published in the *UCLA Law Review* in 1985 is perhaps the most exhaustive evaluation of redistricting criteria published in the past twenty-five years, (Additional sources detailing districting criteria include Dixon 1982; Morrill 1982, 1987 and 1994; Cain 1984; Butler and Cain 1992; Grofman et al., 1992; Grofman 1993; Pildes and Niemi 1993).

REDISTRICTING CRITERIA

What follows is an evaluation of North Carolina's twelve congressional districts on the basis of the following criteria: equal population, contiguity, compactness, the integrity of local government boundaries, and continuity of representation. It should be noted at the outset that it is virtually impossible for a redistricting plan to simultaneously satisfy all criteria perfectly or completely.

In some cases, the real-world application of two criteria may contradict one another. For example, published work on the districting process suggests that the number of county

divisions should be limited where possible. But it is nearly always impossible to have no divided counties in the redistricting process due to the constitutionally-based requirement that districts have little or no difference in their populations. Thus, any county with a population above the ideal population will of necessity be divided among two or more districts. And it is frequently necessary or appropriate to divide counties with smaller populations between two or more districts to achieve compliance with the equality of population criterion or another districting goal. In short, it is indeed rare for a state not to divide some, if not many, counties. At present all southern comparison states include multiple county divisions on their congressional district maps. Twenty-six (38.8%) of Florida's 67 counties, for example, are divided between multiple congressional districts (Duncan and Lawrence 1997: 298-299).

In other cases, data limitations and real-world constraints limit the degree to which one or more criteria may be simultaneously satisfied. For example, a state with an irregular coastline will find it nearly impossible to create highly compact districts in that area of the state. A state which uses county boundaries which follow the irregular courses of rivers will find it difficult if not impossible to create highly compact districts. The pattern of population distribution can also severely limit the degree of resulting compactness. Hence, a state with an uneven population density will likely find it difficult to create highly compact districts while achieving

equality of population between districts. An evaluation of districting plans must therefore consider the existing map in light of state or local conditions, and not solely on the basis of theoretical possibilities.

Some explanation of each criterion's purpose precedes the North Carolina specific evaluation. All Tables and Figures referenced in this evaluation are found sequentially at the rear of the report following the references. An Appendix follows the referenced Tables and Figures which includes maps depicting each of North Carolina's twelve 1992 and 1998 congressional districts.

1) Equality of Population. The "equality of population" criterion stems from the U.S. Constitution and it therefore must carry substantial, if not preeminent, weight in the development of all redistricting plans. Since the 1960s the legally permissible variations between district populations have declined substantially. Concomitant improvements in technology and the detail of the data provided by the U.S. census have allowed ever-greater adherence to the principal of one-person-one-vote.

Population equality between districts may be measured by multiple indicators. The "total deviation" (also referred to as the overall range) is defined as the population difference between the smallest and largest districts (see Grofman 1985: 175, for the total deviations of districts existing in 1983, and

Rayburn and Leib 1994: 23, for the total deviations existing in 1993). The "maximum deviation" is defined as the largest absolute (+ or -) population deviation among a jurisdiction's districts relative to the optimal population (total population/number of seats) to be allocated to each district. Also pertinent is the mean or average of all district deviations from the ideal population. These measures may be expressed in terms of absolute numbers and percents.

The maximum permissible population deviation of districting plans depends on their geographic scale - whether, for example, the districts are used to elect members of the U.S. House of Representatives, a state legislature, or a city council. Due to the limits of both the census of population data and geography, maximum allowable deviations are generally greater the more local the jurisdiction being evaluated. But congressional districts are expected to have total deviations of less than 1% (Morrill 1981; Grofman 1985; Grofman et al., 1992). As determined by Rayburn and Leib (1994: 23), the districting plans in all states in 1993 were in compliance with this criterion with the largest total deviation determined for Georgia at 0.94%.

The ideal population for each congressional district in North Carolina is 552,386 (1990 state population of 6,628,637 / 12 districts = 552,386.42) (Table 1). The average absolute (+ or -) deviation of North Carolina's twelve congressional districts is 361 individuals, or 0.065% of the ideal population

to be allocated to each district. Among the districts, District 7 has the smallest deviation at a mere 4 individuals (0.001%), and District 10 the largest at 947 individuals (0.171%). District 10's deviation thus constitutes the Maximum Deviation for the state's congressional districts. The Total Deviation for the twelve districts is 0.270%.

In terms of the population equality criterion, North Carolina's present congressional districts are well within accepted guidelines. Their level of population equality is therefore evaluated favorably on this criterion. But it should be noted that 1990 census of population data is now eight years old. Based upon population projections by the North Carolina Office of State Planning, the state's 1997 population was nearly 12 percent greater than enumerated in 1990. That office further projects the next Census, to be undertaken in a little over two years, will enumerate 7.7 million North Carolinians, or 16.4 percent more individuals residing in the state than were counted in 1990. Thus, while the constitutional purpose of the census of population is to aid the reapportionment and redistricting process and the 1990 census should be used for such comparisons, malapportionment is clearly a result of using eight year old data, It is therefore true that any subsequent delineation of North Carolina's 12 congressional districts prior to the 2000 census will be hampered in achieving compliance with the preeminent criterion of the districting process, that of equal population between districts.

2) Contiguity.

There is no Constitutional obligation for congressional districts to be contiguous, though some states include such a requirement in their constitutions variously pertaining to legislative or congressional districts (Grofman 1985). The state of North Carolina does not formally stipulate that congressional districts be contiguous. A district is typically defined as contiguous if every part of the district is accessible to all other parts without traveling into a second district. This requirement has rarely generated controversy in the past. When controversy has emerged, the focus of contention has generally pertained to areas dissected by water features and whether bridge connections are sufficient to constitute contiguity (see Grofman 1985: 84).

All of North Carolina's 1998 districts are contiguous, and are thus evaluated favorably on this criterion. Second, on this criterion the present plan compares very favorably with the state's 1992 congressional districts which generated controversy pertaining to the contiguity of the 6th and 12th districts (Grofman 1993: 1261). The practical contiguity of Districts 1, 2, 5 and 10 was also substantially improved. For example, the proruption of District 2 into District 1 in Halifax County in the 1992 plan no longer exists. In the 1998 plan the mutual boundary of Districts 1 and 2 is the Halifax County-Nash County boundary. A second example pertains to the no longer existing proruption of District 5 into District 10. The

boundary between these two districts now entirely follows county boundaries.

3) The Allocation of Local Government or Electoral Units.

The non-division of local political units in their allocation to districts has traditionally been viewed as a legitimate though secondary goal of the districting process. Counties, for example, may constitute political systems in and of themselves. But it is also true that the equal population criterion carries substantially greater weight in all evaluations of districting plans than efforts to limit county subdivisions. Thus, any county which has a population above the ideal population per district will almost certainly be divided into two or more districts in a system which employs single-member districts.

At times it may be either appropriate and/or necessary to subdivide counties with lesser numbers of residents to achieve compliance with the equal population or another districting goal. For example, it may well be appropriate to divide the urban environs of a county from its dominantly rural hinterland given the widely differing circumstances oftentimes found in these two settings. Such divisions can be beneficial to the quality of representation provided to the constituents in a district because Representatives do not have to simultaneously focus their attention on both urban (e.g., mass transit and crime) and rural needs (e.g., agriculture and basic highways).

In short, it is nearly always technically impossible in any state with two or more districts for all counties to be allocated in their entirety to congressional districts and meet the goals of other criteria. And there are numerous practical reasons for dividing counties as well. Hence, county divisions are commonplace and all southeastern state comparators include multiple county divisions (Webster 1995; Duncan and Lawrence 1997).

The 1992 congressional districts in North Carolina divided 44 off [sic] the state's 100 counties (Webster 1995). The 1998 congressional districts reduce this number to 22, a 50% percent decline in the number of county divisions. This level of county divisions compares favorably with Florida, a state having undergone similar litigation, which divides 26 of its 67 counties, or nearly 40%. Thus, from the perspective of county divisions, the 1998 districts are superior to the 1992 districts on this criterion. Secondly, using Florida for the comparator, North Carolina's proportion of divided counties is judged acceptable.

The building block units used to delineate congressional districts differ between states. While some states rely on census units such as blocks or tracts, others use voting districts or precincts (Raburn and Leib 1994: 23). For the 1990 census the Bureau of the Census requested that all states participate in an effort to geographically mesh voting districts with other units of census geography. Approximately three-quarters of the

states fully participated, with the remainder participating in varying degrees. In North Carolina seventy-nine of the state's 100 counties fully participated and are subdivided by voting precincts which follow the boundaries of other units of census geography such as blocks or tracts (see Rayburn and Leib 1994).

It should be a goal of districting plans to avoid subdividing voting precincts wherever possible unless local circumstances make such divisions appropriate. If voting precincts are subdivided by congressional district boundaries, additional polling units or ballot forms may be required. Such changes can lead to voter confusion and frustration.

As of October 1, 1996, there were a total of 2,531 election precincts in the state of North Carolina. The 1992 districts divided 80 precincts. The 1998 districts reduce this number to only 2. Thus, the 1998 districts are vastly superior to the 1992 districts in their very minimal number of voter precinct divisions. Secondly, it has been conveyed by the Attorney General's Office to the author that the basis for the 2 precinct divisions pertained to local circumstances. This being true, the 1998 congressional district map must be judged very favorably in terms of its use of precincts as district building blocks.

Of the 31 counties which do not include census voter precincts, only one (Beaufort County) is not allocated to a 1998

congressional district in its entirety. This division employed township boundaries which are vastly superior to the use of census blocks or tracts which may have little significance to human patterns of interaction or governance.

4) Geographic Compactness.

Unlike the equality of population criterion, the geographic compactness criterion has no foundation in the U.S. Constitution. But it has long been viewed as a legitimate criterion for evaluating redistricting plans, and is included as a goal in approximately half of all state constitutions. The state of North Carolina is not among those states legally requiring that the members of legislative bodies be elected from compact districts (Grofman 1985). But given recent Supreme Court decisions, the compactness criterion has received renewed attention.

There is substantial legal and academic disagreement over the value of mandating districts be compact. First, requiring compact districts does not guard against the political or racial manipulation of electoral space. The geographic resolution and quality of the data now provided by the census in conjunction with the increasing sophistication of computer technology may allow compact districts to be delineated which are also directly discriminatory to a population group. Thus, highly compact districts may be intentionally detrimental to a population group (see both Morrill 1981, and Grofman 1985).

Second, in the real-world perfectly compact districts are an impossibility. Most compactness indices assume that an optimal district will be a perfect circle, the most compact of geometric shapes. But if circles were employed to subdivide the space of a jurisdiction, some of the jurisdiction's area would not be allocated to districts, but be left in the gaps between circles. Thus, circular districts are an unrealistic abstraction without direct application to real-world circumstances.

Third, the building blocks of redistricting plans, blocks, block groups, tracts, or voting precincts, are frequently delineated by streets and are oftentimes square or rectangular in shape. The shapes of these building blocks therefore largely precludes circular districts from being formed.

A fourth concern limiting real world compactness is the constitutional criterion of equality of population discussed above. It is of substantially greater legal necessity to comply with this criterion than to create perfectly compact districts. To meet this constitutional criterion map makers may be forced to create districts of less than perfect compactness. In short, evaluations of the geographic compactness of political districts must consider the constraints faced by the map maker with substantial attention focused upon local circumstances.

Compactness Indicators Used In This Report

There are a host of different geographic compactness measures available (see Niemi, et al., 1990 for a description of 24 different measures). In general these methods concentrate on a district's perimeter, areal dispersion, or population distribution in their design.

Two compactness measures are used in the present report, both of which are now among the most commonly recognized and applied by legal and academic scholars. Their elevated recognition is due largely to their calculation and application in a 1993 *Michigan Law Review* article by Richard Pildes (Professor of Law, University of Michigan) and Richard Niemi (Professor of Political Science, University of Rochester). Both authors are among the most recognized authorities on redistricting and the courts in the United States today. The purpose of their article was to measure the compactness of all congressional districts in the United States existing in 1993 in such a manner as to parallel the discussion in the Supreme Court's decision in *Shaw v. Reno* (1993). Adding to the relevance of this article and its methods was its citation in *Bush v. Vera*, 1996, as supporting evidence for the Supreme Court's findings that three congressional districts in Texas were unconstitutional.

The first measure is based on the geographic "dispersion" of a district. To calculate this measure a circle is

circumscribed around a district. The reported coefficient is the proportion of the area of the circumscribed circle which is also included in the district and ranges from 1.0 (most compact) to 0.0 (least compact).

The second measure is based upon the calculation of the "perimeter" of the district. The reported coefficient is the proportion of the area in the district relative to a circle with the same perimeter and ranges from 1.0 (most compact) to 0.0 (least compact).

Pildes and Niemi (1993: 564) provide some guidance on the evaluation of both measures. With respect to the dispersion compactness measure, they suggest "low" is equal to or less than 0.15. On the perimeter compactness measure they suggest that "low" is equal to or less than 0.05. By suggesting these guidelines they caution that "we do not imply that all districts below those points, or only those districts, are vulnerable after *Shaw*." These cutoff points are therefore best characterized as general guidelines and they should not be employed as absolute indicators of acceptable or unacceptable levels of compactness. Supporting their statement is the fact that in 1998 ten congressional districts in the U.S. are below the 0.05 benchmark on the perimeter measure (e.g., New York's 12th (0.021) and Texas' 6th (0.027)), and 13 are below the 0.15 benchmark on the dispersion measure (e.g., Florida's 22nd (0.0331) and California's 36th (0.042)).

Some Theoretical and Real World Comparisons

In addition to the compactness scores for each of North Carolina's congressional districts, additional scores were calculated for hypothetical and real-world units. The purpose for calculating these additional scores is to provide comparisons for the evaluation of the compactness coefficients for North Carolina's congressional districts. Thus, Figure 3 displays a square circumscribed by a circle. While most would visually evaluate a square district as a highly compact, the geographic dispersion score for the square is .640, and its perimeter compactness score is .785. Similarly, Figure 4 displays a rectangle circumscribed by a circle. Again, while most viewers would visually evaluate a rectangular district as substantially compact, the dispersion compactness of the rectangle is .431 and its perimeter compactness is .641.

Table 2 provides further comparisons in tabular format with selected units also presented in Figures 5-9. Among those units for which the two compactness indicators were calculated are Camden, Davie and Swain counties, the cities of Greensboro, Charlotte and Winston-Salem, and two precincts each in the cities of Greensboro, Charlotte, and Winston-Salem. These additional compactness coefficients provide instructive comparators using real-world geographic units. But it must also be underscored that these units are not directly indicative of the constraints faced by those undertaking the redistricting process. For example, counties are not required to maintain

equal populations and their initial geographic delineations were not constrained by the need to aggregate smaller units of census geography such as tracts and blocks.

With the cautionary notes above in mind, the comparators provided in Table 2 are helpful to contrast the levels of compactness magnitude of real-world political units relative to the square and rectangle examples presented above. Secondly, these more real-world examples are indicative of the contrast in magnitude of the two compactness measures for the same jurisdiction, the perimeter compactness measure generally being lower in magnitude for such units. Thus while Charlotte's dispersion compactness measure is high at .571, its perimeter compactness coefficient is much lower at 0.079. Similar contrasts in the magnitudes of the two coefficients were also found to characterize both Greensboro and Winston-Salem.

The purpose for calculating the compactness coefficients of precincts in the three cities is to demonstrate the constraints posed by the building-block units used by the State of North Carolina in delineating its congressional districts. On the dispersion compactness measure the coefficients range from a low of 0.154 to a high of 0.297 (Table 2). On the perimeter compactness measure the scores range from a low of 0.114 to a high of 0.213. These measures are significant because building-block units of relatively low compactness will

generally result in districts of lesser compactness than districts composed of highly compact building-block units.

Added Constraints Facing Map Makers Drawing Political Districts

As noted above, electoral district compactness must be evaluated with flexibly due to the greater number of constraints placed on the process of their formation. The compactness of a congressional district can be limited by a host of conditions beyond the control of the map maker. For example, many counties use meandering rivers as their boundaries. Thus a congressional district with boundaries following such county boundaries would likely have a limited degree of perimeter compactness. Secondly, simple geographic compactness indicators ignore real-world patterns of interaction, population homogeneity and travel.

Using the river example above, a geographically elongated district centered upon a riverine environment where patterns of employment and sociopolitical interaction are focused upon the river may be highly appropriate. Even more appropriate to the current situation is the focus of a district upon major transportation corridors such as freeways. As stated by Professor Morrill, the most distinguished political geographer in the United States with a long standing interest in the districting process,

> A too simplistic application of . . . geographic compactness measures is foolish, especially where the distribution of the population is uneven, perhaps strung out along roads or railroads. Travel may be easier and cheaper in some directions than in others, such that an elongated district astride a major transportation corridor might in fact be the most compact in the sense of minimum travel time for a representative to travel around the district.

This passage underscores that there are circumstances under which there are appropriate reasons for districts to be of lesser compactness. An excellent example is Florida's 22nd district (see Figure 12). It is described by Duncan and Lawrence (1997: 367) as

> a shoestring of a district hugging the south Atlantic coast from Juno Beach south to Miami Beach. It is roughly 90 miles long and in some places just a few blocks wide. Its width never extends beyond three miles.

This district reflects the reality that the beaches along central Florida's coast are peopled by comparatively wealthy families as compared to those only three or four miles from the coast. It is represented by Republican Clay Shaw, Jr., and to my knowledge has not been the target of any litigation. Its

level of perimeter compactness is 0.0467, while it has the lowest level of dispersion compactness of any congressional district in the United States at 0.0331.

A second example pertains to Illinois' 4th district which has popularly been referred to as the "earmuff district." It has also been described as "C-shaped," "distended," as having an "uncouth configuration," and as resembling a "Rorschach ink blot" (Duncan and Lawrence 1997: 454). While most assuredly contorted in its geographic design, this district was found to be constitutional by the Supreme Court on January 26, 1998 because it serves a compelling state interest. Its dispersion compactness coefficient is 0.1933, while its level of perimeter compactness is 0.0263. Its perimeter compactness score is the second lowest among congressional districts in the United States today (the lowest is New York's 12th district).

It must be stressed that legislators represent people, and the distribution of the population on the landscape is invariably uneven. Given this unevenness, and the desire to include a requisite number of people with similar social, economic or political orientations, among other competing goals, it is largely an impossibility to universally create districts of perfect theoretical compactness. Such an endeavor would be at odds with quality representation, and likely fruitless in result.

North Carolina's Congressional Districts

In 1992 the mean dispersion compactness of North Carolina's twelve congressional districts was 0.280, with the range being from a low of 0.045 for district 12 to a high of 0.440 for district 6 (Table 3). The mean level of dispersion compactness for the 1998 districts substantially increased to 0.354. While the 12th District continued to be the lowest among the state's 12 congressional districts, its dispersion compactness more than doubled to 0.109. Secondly, this level should be evaluated in light of the district's focus upon major transportation corridors including Interstates 40, 77 and 85. District 7 had the greatest level of dispersion compactness at 0.622. It should be noted that District 7's level of compactness is nearly that of the square displayed in Figure 3.

In 1992 the mean level of perimeter compactness for North Carolina's twelve districts was 0.095 (Table 3). The perimeter compactness coefficients ranged from a low of 0.014 for the 12th district to a high of 0.319 calculated for the 4th district. The mean level of perimeter compactness for the 1998 districts is a substantially increased 0.192. These coefficients ranged from a low of 0.041 for the state's 12th district to a high 0.325 for the 7th district. Again, the 12th district's level of objective geographic compactness should be evaluated in light of its focus upon major transportation corridors in the area.

Table 4 presents the absolute and percentage change in the levels of compactness on both the dispersion and perimeter measures for North Carolina's 12 congressional districts. The average district in North Carolina increased its level of dispersion compactness by 0.075 or 39.1%. The increase in the level of District 12th's dispersion compactness was greatest at 142.2%. District 6's level of dispersion compactness actually fell by nearly 18 percent. This finding underscores that changes in one district very frequently lead to changes in other districts, and the direction of such successive impacts will not necessarily be in the desired direction.

The average level of perimeter compactness for the state's 1998 districts is also well above what existed in 1992 (Table 4). The mean district's level of compactness rose 0.097 or nearly 172%. District 7's increase was the greatest at 525%. District 4's perimeter compactness fell by over 13%.

North Carolina Compared to Other States

Other states have made adjustments to their congressional districts since 1992 because of litigation similar to that experienced by North Carolina. Table 5 compares the means for both compactness indicators in 1992 and 1998 for the state's of North Carolina, Florida, Georgia and Texas. These coefficients are invaluable because they suggest the degree of change impacting all districts within each state. In short, the redrawing of a single district may impact most other

districts in a state. Thus, while North Carolina's 12th district was a principal focus of legal challenges, no district in the state was left untouched by the changes to its design.

North Carolina's mean dispersion compactness coefficient is 0.354 for the 1998 districts, higher than both Florida and Texas (Table 5). Its mean dispersion compactness rose by 0.074, or 26.4% between the 1992 and 1998 plans. This mean increase in compactness was the greatest of the four states examined.

North Carolina's mean perimeter compactness coefficient is 0.192 for the 1998 districts, higher than that for Texas (0.164) and similar to that calculated for Florida (0.207) (Table 5). In terms of absolute change, North Carolina's mean level of perimeter compactness rose from 0.095 to 0.192, or by 0.097. In terms of both absolute and percentage change, this level of increase was the greatest among the four states examined, doubling the percentage increase of second place Georgia.

Table 6 specifically compares the levels of compactness for North Carolina's 12th congressional district with other challenged districts in North Carolina, Florida, Georgia, Illinois and Texas. As can be ascertained from the Table, the increase in the 12th district's level of dispersion compactness is second only to Georgia's 11th district among those examined. While the 12th district experienced the second smallest level of

increase among the set of districts considered on the perimeter compactness measure, its increase was substantial at 192.9%.

The levels of compactness for North Carolina's twelve districts are substantially increased in the 1998 districts as compared to the 1992 districts. Thus, the system as a whole experienced a substantial increase in compactness. At present eleven of the state's twelve districts are above the benchmarks suggested by Niemi and Pildes (1993) as indicative of "low" compactness. While the 12th congressional district's level of compactness remains marginally below the suggested benchmarks, its level of increase is substantial and is comparable to that of redrawn districts in other states. Secondly, and in reference to the earlier quote by Professor Morrill, evaluations of the 12th district's geographic compactness should also consider its travel time compactness. Travel times are rarely a direct function of straight line distances. Rather the available travel modes and directness of traffic corridors between points must also be considered. Thus it is highly probable that the time needed for the 12th district's representative to travel to meet constituents at opposite ends of the district is substantially less than in many if not most other more geographically compact districts.

5) Continuity of Representation.

It is counterproductive to fundamentally alter the system of districts in a state each time new districts are

delineated. Wholesale change may lead to voter confusion and frustration, and thus non-participation. While the goal of preserving the integrity of the district system may be difficult if a state has experienced substantial population growth in the decennial districting cycle, boundary "stability helps to develop and maintain a sense of identity with districts" (Morrill 1981: 27). The goal of maximizing the continuity of representation is particularly important when changes occur in the middle of the normal decennial redistricting cycle. Thus the voters of the state of North Carolina have now experienced two significant changes to their district association in the past seven years, with a third necessarily coming for the 2002 election cycle.

It is clear that the 1998 congressional districts are significantly different from those employed in the elections of 1992, 1994, and 1996. It is also clear that effort was expended to maintain the geographic cores of the 1992 districts in the 1998 remap. Table 7 presents the proportion of each district's area in 1992 which remains in the 1998 districts. On average 76.4% of the area in each of the state's twelve districts in 1992 was preserved in the 1998 districts. This proportion ranges from a high of 96.7% for the 11th district to a low of 41.6% for the 12th district. Thus, the 12th district was more dramatically redrawn than any other district in the state. By comparison, when Florida's 3rd district was redrawn under similar circumstances, 48.4% of the area of the early 1990s district was preserved in the current district (see Figures 10 and 11).

The changes created by the redrawing of North Carolina's congressional districts also shifted one-quarter of the state's population to a different district, a very substantial movement of the population between districts even for a decennial redistricting (Table 8). The impact on individual districts ranged from a low of 7.6% of District 11's population being shifted, to a high of 40.5% for District 2's population. Districts 1, 2, 4, 5, and 12 all had more than 30% of their residents shifted to another district in the 1998 remap. Clearly, such substantial shifts from one representative to another can be unsettling for many constituents.

Attention to balancing the legal necessity for change with the interests of those represented is appropriate in all districting cycles, but most particularly for those changes in the middle of the normal decennial cycle. The changes in the 1998 districts as compared to the 1992 districts cannot be characterized as minimal. Rather I would characterize the change as moderate because attention was paid to maintaining the geographic cores of the 1992 districts (I would characterize extreme change as a plan that paid no heed to the existing geographic cores of the former districts). Thus, on this criterion I evaluate the efforts of those producing the remap favorably because of their balance in complying with the June 1996 court order while preserving a moderate level of continuity of representation for residents of the state's twelve congressional districts,

Conclusions

The purpose of this report was to examine the twelve 1998 congressional districts in the state of North Carolina from the perspective of five traditional redistricting criteria. Where appropriate the current districts were compared with those first used in the 1992 congressional elections. The findings of this report are summarized below.

1) Equal Population. The total deviation of the 1998 districts is 0.270%, well below the generally accepted guideline of less than 1.0%. Thus the present districts are evaluated positively on this criterion.

2) Contiguity. All twelve of North Carolina's 1998 districts are contiguous and are therefore evaluated positively on this criterion. Secondly, the level of practical contiguity in the 1998 districts is substantially increased over that existing in the 1992 districts, particularly as this criterion relates to the 6th and 12 districts. Thus, when considering the change between the 1992 and 1998 districts, the current plan is evaluated very favorably.

3) The Allocation of Local Government or Electoral Units. The 1998 districts reduce the number of divided counties from 44 in 1992 to 22 at present. This is a substantial reduction and the present plan is therefore evaluated favorably from this perspective. Secondly, the 1998 districts effectively

employed voting precincts as building blocks with only 2 of the 2,531 census defined precincts in the state being divided. Of the 31 counties not subdivided by census defined voting precincts, only one was divided in the districting process. In this case (Beaufort County), township boundaries were used, which are far better building blocks than census blocks or tracts.

4) Geographic Compactness. The level of compactness determined for the 1998 districts is substantially improved over that existing in the 1992 districts. At present only the 12th congressional district is marginally below the suggested guidelines for judging "low" compactness. But such judgements should also consider the rate of change for the 12th, which was found here to be very substantial and in line with the magnitude of change experienced for other districts ordered redrawn by the court system. Secondly, the 12th's level of compactness is similar to other existing districts not under challenge (e.g., Florida's 22nd, see Figure 12), and at least one district found constitutional by the Supreme Court (e.g., Illinois' 4th). Finally, Professor Morrill's 1981 argument that elongated districts which center upon transportation corridors may be highly compact in terms of travel time is pertinent.

5) Continuity of Representation. The redrawing of North Carolina's 1992 congressional districts introduced substantial change in the state's system of representation. On average, 24% of the area in the 1992 districts was allocated to

a different district on the 1998 map. Most dramatic was the impact upon the 12th congressional district - the 1998 district includes only 42% of the original area of the 1992 district. Similarly, nearly 26% of North Carolina's population was moved to a different district in the 1998 plan as compared to the 1992 map. The magnitude of this change is substantial, most particularly in a mid-decennial redrawing of the state's congressional districts. In short, those undertaking the remap appear to have sought balance between the necessity of district boundary change and the preservation of representational continuity.

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DR. WEBSTER'S REPORT, CONTINUED . . .

Table 1
Population Equality Between North Carolina
Congressional Districts Existing in 1998*

District #	Total Population	Absolute Deviation[a]	Percent Deviation[b]
1	552,161	225	-0.041%
2	552,152	234	-0.042
3	552,622	236	+0.043
4	551,842	544	-0.098
5	552,084	302	-0.055
6	552,171	215	-0.039
7	552,382	4	-0.001
8	553,143	757	+0.137
9	552,615	229	+0.041
10	553,333	947	+0.171
11	552,089	297	-0.054
12	552,043	343	-0.062
Total	6,628,637	--	--
Mean	552,386	361	0.065%

DR. WEBSTER'S REPORT, TABLE 1, CONTINUED . . .

District #	Total Population	Absolute Deviation[a]	Percent Deviation[b]
Total Deviation[c]		1,491	0.270%
Maximum Deviation[d]		947	0.171%

* Based upon the 1990 Census of Population.

a Absolute difference between district and mean of 552,386.

b Percentage difference between district and mean of 552,386.

c The total deviation is the difference between the largest (#10) and smallest (#4) district.

d The maximum deviation constitutes that district most deviating from the ideal population.

SOURCE: Calculated by author from data provided by State of North Carolina and reflecting the 1990 Census of Population.

DR. WEBSTER'S REPORT, CONTINUED . . .

Table 2
Comparator Compactness Indicators for Geographic Units in North Carolina

Geographic Unit	Dispersion Compactness	Perimeter Compactness
North Carolina*	0.268	0.382
Selected Counties:		
Camden County*	0.173	0.242
Davie County*	0.540	0.410
Swain County*	0.321	0.265
Selected Cities:		
Greensboro	0.444	0.113
Charlotte*	0.571	0.079
Winston-Salem	0.548	0.075
Precincts in Greensboro:		
Number 119	0.297	0.173
Number 139	0.289	0.207

DR. WEBSTER'S REPORT, TABLE 2, CONTINUED . . .

Geographic Unit	Dispersion Compactness	Perimeter Compactness
Precincts in Charlotte:		
Number 10X2	0.179	0.212
Number 195	0.154	0.213
Precincts in Winston-Salem:		
Number 1439	0.211	0.199
Number 1446	0.184	0.114

* Units for which there are accompanying figures.

SOURCE: Compactness measure coefficients calculated by University of Alabama Cartography Lab using U.S. Bureau of the Census TIGER Files.

DR. WEBSTER'S REPORT, CONTINUED . . .

Table 3
Compactness of North Carolina Congressional Districts
as Existing in 1992 and 1998[a]

	1992		1998	
District	Disper.[b]	Perim.[c]	Disper.[b]	Perim.[c]
1	.254	.028	.317	.107
2	.247	.061	.407	.176
3	.350	.055	.407	.129
4	.398	.319	.450	.277
5	.136	.080	.206	.130
6	.440	.092	.362	.113
7	.287	.052	.622	.325
8	.334	.166	.345	.255
9	.281	.070	.292	.193
10	.299	.061	.402	.259
11	.288	.143	.335	.306
12	.045	.014	.109	.041
Mean	.280	.095	.354	.192

DR. WEBSTER'S REPORT, TABLE 3, CONTINUED . . .

SOURCE: Compactness measures for 1992 districts were calculated by Election Data Services. Compactness measures for the 1998 districts were calculated by the University of Alabama Cartography Lab.

[a] Both the "dispersion" and "perimeter" compactness measures are discussed in Pildes and Niemi (993). This article was cited in the Supreme Court's plurality decision in *Bush v. Vera* (June, 1996) as providing substantiation for its ruling that Texas congressional districts 18, 29 and 30 were unconstitutional. The comparable indices for the three Texas districts prior to the decision were as follows: District 18: dispersion .36, perimeter .01. District 29: dispersion .19, perimeter .01. District 30: dispersion .24, perimeter .02. Perimeter measures are typically of lesser magnitude than dispersion scores. In 1993, 13% of all congressional districts had perimeter scores below .10. In 1998 9% of all districts are below .10 on the perimeter compactness measure.

[b] This measure ranges from 0.0 (least compact) to 1.0 (most compact). To calculate this measure the district is first circumscribed by a circle. The coefficient is the percentage of the area in the circumscribed circle which is also contianed in the district.

[c] This measure ranges from 0.0 (least compact) to 1.0 (most compact). To calculate this measure the perimeter of the district is first calculated. The area of a circle with this perimeter is then calculated. The reported coefficient is the proportion of the area in the district relative to the circle. The equation used is (((4 x Pi) x Area of District) / (District's Perimeter^2)).

DR. WEBSTER'S REPORT, CONTINUED . . .

Table 4
Change in Compactness of North Carolina Congressional Districts as Existing in 1992 and 1998[a]

District No.	Change in Compactness			
	Dispersion		Perimeter	
	Absolute	Percent	Absolute	Percent
1	+.063	+24.8%	+.079	+282.1%
2	+.160	+64.8%	+.115	+188.5%
3	+.057	+16.3%	+.074	+134.5%
4	+.052	+13.1%	-.042	-13.2%
5	+.070	+51.5%	+.050	+62.5%
6	-.078	-17.7%	+.021	+22.8%
7	+.335	+116.7%	+.273	+525.0%
8	+.011	+3.3%	+.089	+53.6%
9	+.011	+3.9%	+.123	+175.7%
10	+.103	+34.4%	+.198	+324.6%
11	+.047	+16.3%	+.163	+114.0%
12	+.064	+142.2%	+.027	+192.8%
Mean	+.075	+39.1%	+.097	+171.9%

DR. WEBSTER'S REPORT, TABLE 4, CONTINUED . . .

SOURCE: Calculated by author from data in Table 3.

[a] Both the "dispersion" and "perimeter" compactness measures are discussed in Pildes and Niemi (1993). See Table 3 for definitions of measures.

Table 5

Increase in North Carolina Congressional District
Compactness in Comparison to Florida, Georgia and Texas

Mean Dispersion Compactness

State	1992	1998	Absolute Change	Percent Change
North Carolina (N=12)	.280	.354	+0.074	+26.4%
Florida (N=23)	.314	.323	+0.009	+2.9%
Georgia (N=11)	.347	.400	+0.053	+15.3%
Texas (N=30)	.310	.322	+0.012	+3.9%

Mean Perimeter Compactness

State	1992	1998	Absolute Change	Percent Change
North Carolina (N=12)	.095	.192	+0.097	+102.1%
Florida (N=23)	.203	.207	+0.004	+2.0%
Georgia (N=11)	.181	.272	+0.091	+50.3%
Texas (N=30)	.131	.164	+0.033	+25.2%

SOURCE: Calculated by author.

Table 6

Increase in Congressional District Compactness of Selected[a]
Congressional Districts in North Carolina, Florida, Georgia, Illinois and Texas

State	Dispersion Compactness 1992	1998	Absolute Change	Percent Change
North Carolina				
District 1	0.254	0.317	+0.063	+24.8%
District 12	0.045	0.109	+0.064	+142.2
Florida				
District 3	0.111	0.136	+0.025	+22.5
Georgia				
District 2	0.323	0.541	+0.218	+67.5
District 11	0.169	0.444	+0.275	+162.7

State	Dispersion Compactness 1992	1998	Absolute Change	Percent Change
Illinois				
District 4	0.193	0.193	0.000	0.0
Texas				
District 18	0.356	0.335	-0.021	-5.9
District 29	0.194	0.384	+0.190	+97.9
District 30	0.243	0.383	+0.140	+57.6

DR. WEBSTER'S REPORT, TABLE 6, CONTINUED . . .

State	Perimeter Compactness 1992	1998	Absolute Change	Percent Change
North Carolina				
District 1	0.028	0.107	+0.076	+282.1%
District 12	0.014	0.041	+0.027	+192.9
Florida				
District 3	0.011	0.050	+0.039	+354.5
Georgia				
District 2	0.088	0.411	+0.323	+367.0
District 11	0.065	0.259	+0.194	+298.5
Illinois				
District 4	0.026	0.026	0.000	0.0

DR. WEBSTER'S REPORT, TABLE 6, CONTINUED . . .

State	Perimeter Compactness 1992	1998	Absolute Change	Percent Change
Texas				
District 18	0.011	0.151	+0.140	+1,272.7
District 29	0.008	0.178	+0.170	+2,125.0
District 30	0.016	0.180	+0.164	+1,025.0

SOURCE: Calculated by author.

* While North Carolina's 1st and 12th Districts were both challenged, only the 12th was ruled unconstitutional on June 13, 1996. Florida's 3rd District was ruled unconstitutional on April 17th, 1996. Georgia's 11th District was ruled unconstitutional on June 29th, 1995, and its 2nd District was found likewise on October 30, 1995. Illinois' 4th District has been the subject of nearly continuous criticism and litigation since its creation. But the district was found constitional due to a compelling state interest by the Supreme Court on January 26, 1998. Texas' 18th, 29th and 30th Districts were ruled unconstitutional on June 13th, 1996.

DR. WEBSTER'S REPORT, CONTINUED . . .

Table 7
Proportion of Area in 1992 Districts That
Remains in the 1998 Districts

District #	Percentage of 1992 Area That Remains in the 1998 Districts
1	65.3%
2	70.3%
3	75.2%
4	75.5%
5	66.3%
6	81.8%
7	88.3%
8	86.9%
9	90.0%
10	79.4%
11	96.7%
12	41.6%
Mean	76.4%

SOURCE: Calculated by the University of Alabama Cartography Laboratory.

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DR. WEBSTER'S REPORT, CONTINUED . . .

Table 8
Population Shifts from 1992 Districts in the
Drawing of the 1998 Districts

District #	Number of People Shifted from 1992 District	Percentage of 1992 District Population Shifted
1	180,984	32.8%
2	223,685	40.5%
3	148,886	26.9%
4	194,395	35.2%
5	177,687	32.2%
6	143,065	25.9%
7	155,585	28.2%
8	81,410	14.7%
9	53,587	9.7%
10	118,426	21.4%
11	42,110	7.6%
12	174,471	31.6%
Total	1,694,291 (25.6% of state's pop.)	
Mean	141,191	25.6%

SOURCE: Based upon data provided by the State of North Carolina and reflecting the 1990 Census of Population.

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SHAW, ET AL. V. HUNT, ET AL., CA NO. 92-202-CIV-5-BR, ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SEPTEMBER 12, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
GOVERNOR JAMES B. HUNT, in his official capacity as Governor of the State of North Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

ORDER

For reasons given in the contemporaneously filed Memorandum Opinion, it is ORDERED

***SHAW* ORDER OF SEPTEMBER 12, 1997, CONTINUED . . .**

1. That the congressional redistricting plan (1997 N.C. Sess. Laws, Ch. 11) submitted by the state defendants to this court for review on April 1, 1997, is hereby APPROVED as having adequately remedied the specific constitutional violation respecting former congressional District 12 that was found by the Supreme Court of the United States in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996);

2. That this court's injunction entered on July 30, 1996, which *inter alia*, prohibited the conduct of further congressional elections pending approval of a remedial redistricting plan is hereby DISSOLVED;

3. That the claim added by amendment to the complaint in this action on July 12, 1996, which challenged on "racial gerrymandering" grounds the creation of former congressional District 1, is hereby DISMISSED, without prejudice, as moot; and

4. Defendants' motion suggesting a schedule and process for approving the state's new congressional redistricting plan is DENIED as moot.

This 12th day of September, 1997.

For the Court: /s/ W. Earl Britt
United States District Judge

SHAW, ET AL. V. HUNT, ET AL., CA NO. 92-202-CIV-5-BR, MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SEPTEMBER 12, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
)
v.)
GOVERNOR JAMES B. HUNT, in his official capacity as Governor of the State of North Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

MEMORANDUM OPINION

SHAW MEMORANDUM OPINION OF SEPTEMBER 12, 1997, CONTINUED . . .

PER CURIAM:

This matter is before the court upon submission by the state-defendants of a congressional redistricting plan enacted by the General Assembly of North Carolina in compliance with this court's injunctive decree of July 30, 1996. The submission seeks approval of the plan as having adequately remedied the constitutional violation found by the Supreme Court of the United States in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996), and, in consequence, a dissolution of this court's injunction against the conduct of further congressional elections pending that approval.

For reasons that follow, we conclude that the plan does adequately remedy the specific constitutional violation found as to the plaintiffs and plaintiff-intervenors in this case, and on that basis we will enter an order approving the plan to that extent and dissolving the extant injunction.

I.

On June 13, 1996, the Supreme Court of the United States entered its judgment remanding this action for further proceedings by this court in conformity with the Supreme Court's decision that North Carolina's then-extant congressional redistricting plan was unconstitutional because unjustified "racial gerrymandering" in the location and

configuration of District 12 violated equal protection rights of some of the named plaintiffs in the action. *Shaw*, 116 S. Ct. at 1899.

Pending receipt of the Supreme Court's mandate which did not issue immediately, this court, on July 12, 1996, granted an unopposed motion by plaintiffs and plaintiff-intervenors to amend the complaint in the action to add new parties and to raise a *Shaw* claim challenge to District 1.

Following receipt of the Supreme Court's mandate and after holding a hearing on the implementation of the required remedy for the constitutional violation, we entered an order on July 30, 1996, that enjoined the state-defendants from conducting any congressional elections under the then existing redistricting plan after the 1996 elections, but allowed the then ongoing electoral process for those elections to proceed to completion. The order referred the development of a proposed remedial plan to the General Assembly of North Carolina for exercise of its primary jurisdiction in the matter, with instructions to enact and submit to this court a proposed remedial plan by April 1, 1997. The order retained jurisdiction in this court to act in default of timely action by the General Assembly, for approval of any plan submitted, and for such further proceedings as might be required.

The General Assembly enacted a proposed remedial plan on March 31, 1997 (1997 N.C. Sess. Laws, Ch. 11) and timely submitted it to this court for approval on April 1, 1997. Contemporaneously, the State submitted the plan for preclearance by the United States Department of Justice pursuant to § 5 of the Voting Rights Act and we deferred action on the plan pending action by the Justice Department. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981).

While preclearance action was pending, we entered an order on May 28, 1997, denying intervention either of right or permissively to a number of African-American voters and associations who sought intervention both to suggest alternative remedial plans and to raise specific vote-dilution challenges under § 2 of the Voting Rights Act to certain districts in the proposed plan. We found no right to intervene under the provisions of Fed. R. Civ. P. 24(a), and declined to exercise our discretion to permit expansion of this action to include new § 2 dilution claims under Fed. R. Civ. P. 24(b).

On June 9, 1997, the Department of Justice precleared the plan pursuant to § 5 of the Voting Rights Act. On that same day, we entered an order directing plaintiffs and plaintiff-intervenors to advise the court by June 19, 1997, whether they intended to object to approval of the plan by this court and, if so, to identify the basis of their objections.

***SHAW* MEMORANDUM OPINION OF SEPTEMBER 12, 1997, CONTINUED . . .**

In response, the plaintiffs (both original and added), while asserting protectively the plan's inadequacy, disclaimed standing under the principles of *United States v. Hays*, 515 U.S. 737 (1995), to make any challenge to the plan because, they asserted, none of the original plaintiffs resided in the "new" Twelfth District, nor did any of the added plaintiffs reside in either the original or "new" Twelfth.

Separately responding, the plaintiff-intervenors, reasserting a position previously urged by motion, also declined to make substantive objection to the plan. They contended instead that the action, having been mooted by the legislative action, could only be dismissed without prejudice on that basis.

The state defendants, replying to these separate disclaimers of standing and assertions that the entire action was moot contended (1) that there were both plaintiffs and plaintiff-intervenors with the requisite standing to make substantive challenges to the submitted plan as to both Districts 1 and 12, and (2) that the action was not mooted by virtue of the legislative action. On this basis, they contended that the parties with standing should be required to make such challenges as they could, and that this court was empowered and obligated to exercise its continuing jurisdiction to review the submitted plan to determine whether it remedies the constitutional violation found by the Supreme Court.

***SHAW* MEMORANDUM OPINION OF SEPTEMBER 12, 1997, CONTINUED . . .**

II.

We first address the issues presented by the lack-of-standing and mootness positions taken by the plaintiffs and plaintiff-intervenors and disputed by the state defendants, and the consequent declination by the plaintiffs and plaintiff-intervenors to take any substantive position on the adequacy of the proposed remedial plan, then turn to the merits.

1. To the extent the plaintiff-intervenors' contention is that the entire action has been mooted by the legislature's enactment of a remedial plan, thereby depriving this court of jurisdiction even to approve or disapprove the plan and requiring a simple dismissal without prejudice, we reject the contention. Neither of the Supreme Court decisions relied upon for the proposition supports it; each is inapposite.

In *Louisiana v. Hays*, 116 S. Ct. 2542 (1996), a pending appeal from a three-judge court-ordered redistricting plan was dismissed as moot. In that case, the state legislature had in the interval independently adopted and enacted the plan. This obviously mooted any basis for Supreme Court review of the district court order, whereas here the very matter pending judicial review is the legislative enactment.

In *Johnson v. Northam*, No. TCA 94-40025-MMP, 1996 WL 297280 (N.D. Fla. May 31, 1996), a three-judge

court, after hearing the parties on the adequacies of a legislative remedial plan and approving it, then ordered the case "closed with respect to the remedies that have been rendered to correct any constitutional infirmity found" in the challenged plan. *Id.* at *1. Rather than demonstrating that a legislature's enactment and submission of a proposed remedial plan moots the action, the case demonstrates to the contrary the continuing jurisdiction of the court to act in judicial review of the enacted plan before "closing" the case.

We therefore conclude that legislative enactment of the submitted plan did not, by mooting the entire action, deprive this court of its expressly retained jurisdiction to review the plan for approval.

2. Though enactment of the plan submitted has not mooted the entire action, it has effectively mooted the *Shaw*-claim added by amendment to challenge District 1. As we expressly anticipated in deferring consideration of that added claim pending legislative action, the remedial plan significantly reconfigures the area formerly comprising that district, making the claim challenging its former configuration, location, and racial composition moot. Because as to that claim we therefore have no retained approval jurisdiction, it may be dismissed for mootness if the plan is approved as having adequately remedied the specific violation that has been determined as to District 12.

3. Assuming without deciding (the fact being disputed) that--as they assert--none of the plaintiffs resides in "new District 12," any resulting lack of standing on their part to challenge the constitutionality of that particular reconfiguration of districts cannot affect our retained jurisdiction to review the plan for its adequacy to remedy the violation found as to former District 12. We are doubtful that the non-inclusion of successful plaintiffs in any particular reconfigured district that is assumed to be *the* specific remedial district could be thought, because of the *Hays* residence requirement, to deprive them of standing to challenge the remedial plan as inadequate for the purpose at issue. But we need not attempt to decide that quirky problem growing out of the *Hays* standing rule. It suffices for our purposes that, for reasons satisfactory to themselves, the plaintiffs have formally chosen not to raise any substantive challenge to the adequacy of the plan to remedy the specific violation found as to former District 12.

In that circumstance, we may properly approve the plan as having remedied the specific violation found on the simple basis that its adequacy for that purpose has not been challenged by any party to the litigation. Under long-settled judicial redistricting principles, once a state legislature enacts a remedial plan that is then precleared under § 5 of the Voting Rights Act, that plan "will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*

v. Lipscomb, 437 U.S. 535, 540 (1978). That principle simply applies in this particular context the general presumption that, until successfully challenged, state legislative enactments are in conformity with constitutional requirements.

There having been no substantive challenge to the plan by any party to this action, we will therefore approve it as a constitutionally adequate remedy for the specific violation found by the Supreme Court in this case.

4. We close by noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not--cannot--run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.

III.

For the foregoing reasons, an order will be entered which approves the submitted plan to the extent noted, dissolves the injunction of July 30, 1996 against the conduct of

further congressional elections, and dismisses without prejudice, as moot, the claim added by amendment to challenge former congressional District 1.

U.S. CONST. amend. XIV, § 1

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION;DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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FED. R. CIV. P. 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FED. R. CIV. P. 56, CONTINUED . . .

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits. Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise

FED. R. CIV. P. 56, CONTINUED . . .

provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, JUNE 22, 1998

[Caption Omitted in Printing]

This matter is before the Court on the Defendants' submission of a congressional districting plan for the 1998 congressional elections (the "1998 plan"). By Order dated April 21, 1998, this Court directed the North Carolina General Assembly to enact legislation revising the 1997 congressional districting plan and to submit copies to the Court. The General Assembly enacted House Bill 1394, Session Law 1998-2, redistricting the State of North Carolina's twelve congressional districts, and the Defendants timely submitted the 1998 plan to the Court. The Plaintiffs subsequently filed an opposition and objections to the 1998 plan, and the Defendants have responded to the Plaintiffs' objections. On June 8, 1998, the United States Department of Justice precleared the 1998 plan pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and this Court must now decide whether the 1998 plan complies with the Equal Protection Clause of the United States Constitution.

Because the Court cannot now say that race was the predominant factor in the drawing of District 12 in the 1998 congressional districting plan, the revised plan is not in violation of the United States Constitution, and the 1998 congressional elections should proceed as scheduled in the Court's April 21 Order.

ORDER, CONTINUED . . .

* * * *

In *Shaw v. Hunt*, the United States Supreme Court considered challenges to North Carolina's 1992 congressional districting plan (the "1992 plan") and held that the Twelfth Congressional District ("District 12") in the 1992 plan was drawn with race as the predominant factor, that the districting plan was not narrowly tailored to serve a compelling state interest, and that the 1992 plan violated the Equal Protection Clause. 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) ("*Shaw I*"); 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996) ("*Shaw II*").

After the North Carolina General Assembly redrew the State's congressional districting plan in 1997, the Plaintiffs in this action challenged the constitutionality of the 1997 plan in this Court. Specifically, the Plaintiffs argued that the Twelfth and First Congressional Districts were unconstitutional racial gerrymanders. Each party moved for summary judgment, and in an Order dated April 3, 1998, the Court granted summary judgment in favor of the Plaintiffs with respect to District 12. Like the Supreme Court in *Shaw*, this Court held that race was the predominant factor in the drawing of District 12 in the 1997 plan, and that the district was violative of Equal Protection. In its April 3 Order, the Court instructed the Defendants to submit a new plan in which race was not the predominant factor in the drawing of District 12.

ORDER, CONTINUED . . .

The Court found that neither party could prevail as a matter of law with respect to District 1, and denied summary judgment as to that district. Neither this Court nor the Supreme Court in *Shaw* has made a legal ruling on the constitutionality of District I under the 1992, 1997, or 1998 congressional districting plans.

* * * *

In *Wise v. Lipscomb* the Supreme Court advised that "[w]hen a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." 437 U.S. 535, 540, 98 S. Ct. 2493, 2497, 57 L. Ed. 2d 411 (1978). In reevaluating a substitute districting plan, the court must be cognizant that "a state's freedom of choice to devise a substitute for an apportionment plan found unconstitutional, either in whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Id.* (quoting *Bums v. Richardson,* 384 U.S. 73, 85, 86 S. Ct. 1286, 1293, 16 L. Ed. 2d 376 (1966)). Finally, as the Supreme Court has noted, because "federal court review of districting legislation represents a serious intrusion on the most vital of local functions," this Court must "exercise extraordinary caution in adjudicating" the issues now before it. *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488, 132 L. Ed. 2d 762 (1995).

ORDER, CONTINUED . . .

Because this Court held only that District 12 in the 1997 plan unconstitutionally used race as the predominant factor in drawing District 12, the Court is now limited to deciding whether race was the predominant factor in the redrawing of District 12 in the 1998 plan. In reviewing the General Assembly's 1998 plan, the Court now concludes that on the record now before us that race cannot be held to have been the predominant factor in redrawing District 12. In enacting the 1998 plan, the General Assembly aimed to specifically address this Court's concerns about District 12. Thus, the present showing supports the proposition that the primary goal of the legislature in drafting the new plan was "to eliminate the constitutional defects in District 12." Aff. of Gerry F. Cohen. The State also hoped to change as few districts as possible, to maintain the partisan balance of the State's congressional delegation, to keep incumbents in separate districts and preserve the cores of those districts, and to reduce the division of counties and cities, especially where the Court found the divisions were based on racial lines. *Id.*

With the foregoing in mind, the General Assembly successfully addressed the concerns noted by the Court in its Memorandum Opinion for the purposes of the instant Order. Thus, the 1998 plan includes a Twelfth Congressional District with fewer counties, fewer divided counties, a more "regular" geographic shape, fewer divided towns, and higher dispersion and perimeter compactness measures. District 12 now contains five, rather than six, counties, and one of those counties is

whole. District 12 no longer contains any part of the City of Greensboro or Guilford County. The 1998 plan no longer divides Thomasville, Salisbury, Spencer, or Statesville. The new plan also addresses the Court's concern that it not assign precincts on a racial basis. While the Court noted in its Memorandum Opinion that the 1997 plan excepted from District 12 many adjacent "voting precincts with less than 35 percent African-American population, but heavily Democratic voting registrations," the 1998 plan includes fourteen precincts in Mecklenburg County in which previous Democratic performance was sufficient to further the State's interest in maintaining the partisan balance within the congressional delegation. The General Assembly also added several Forsyth County precincts to smooth and regularize the District's boundaries. These changes resulted in a total African-American population in District 12 of 35 percent of the total population of the district, down from 46 percent under the 1997 plan.

• • • •

Based on the foregoing, the Court now accepts the 1998 plan as written. The 1998 congressional elections will thus proceed under this plan, as scheduled in this Court's April 21, 1998, Order. As noted above, neither this Court nor any other has made a legal ruling on the constitutionality of District 1. The 1998 plan is only approved with respect to the 1998 congressional elections, but the Court reserves jurisdiction with regard to the constitutionality of District I under this plan and as to District 12 should new evidence emerge. This matter

should therefore proceed with discovery and trial accordingly. The parties are ordered to submit proposed discovery schedules to the Court on or before June 30, 1998.

SO ORDERED.

This 19th day of June, 1998.

SAM J. ERVIN, III
United States Circuit Judge
TERRENCE W. BOYLE
Chief United States District Judge
RICHARD L. VOORHEES
United States District Judge

By: /s/ TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT

***SHAW, ET AL. V. HUNT, ET AL.*, CA NO. 92-202-CIV-5-BR, ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, JUNE 9, 1997**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
GOVERNOR JAMES B. HUNT, in his official)
capacity as Governor of the State of North)
Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

ORDER

The United States Department of Justice has precleared the congressional districting plan submitted to this court on 1 April 1997. The court hereby ORDERS plaintiffs and plaintiff-

***SHAW* ORDER OF JUNE 9, 1997, CONTINUED . . .**

intervenors to advise the court by 19 June 1997 whether they intend to claim that the plan should not be approved by the court because it does not cure the constitutional defects in the former plan and to identify the basis for that claim.

This 9th day of June, 1997.

J. DICKSON PHILLIPS, JR.
Senior United States Circuit Judge
RICHARD L. VOORHEERS
Chief United States District Judge
W. EARL BRITT
United States District Judge

/s/ W. Earl Britt
United States District Judge

***SHAW, ET AL. V. HUNT, ET AL.*, CA NO. 92-202-CIV-5-BR, PLAINTIFFS' RESPONSE TO ORDER OF JUNE 9, 1997, JUNE 19, 1997**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
GOVERNOR JAMES B. HUNT, in his official capacity as Governor of the State of North Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

RESPONSE TO ORDER OF JUNE 9, 1997

The Plaintiffs respond as follows to the Court's Order of June 9, 1997, that they and Plaintiff-Intervenors advise the Court whether they intend to claim that the plan precleared by

PLAINTIFFS' RESPONSE, CONTINUED . . .

the Department of Justice does not cure constitutional defects in the former plan and, if so, what is the basis for the claim:

1. The original Plaintiffs, as well as the three additional Plaintiffs, believe that the new plan does not adequately cure the constitutional defects in the former plan, which the Supreme Court held to be unconstitutional. *Shaw v. Hunt*, 116 S.Ct. 1894 (1996).

2. Like its predecessor, the new plan was predominately motivated by race, and does not survive "strict scrutiny."

3. The Supreme Court found that in the earlier plan the Twelfth District was not narrowly tailored. Furthermore, a comparison of the new plan's majority-black First District with the majority-black First District of the earlier plan makes clear that the First District in the earlier plan was also race-motivated, not "narrowly tailored," and could have been far more compact and more consistent with "communities of interest."

4. The new plan fragments counties and cities unnecessarily, ignores communities of interest, and remains bizarre in appearance. The differences between the new plan's majority-black Twelfth District and the unconstitutional majority-black Twelfth District of the earlier plan are cosmetic,

and the creation of the new Twelfth District was predominately motivated by race.

5. The Twelfth District in the new plan is based on the racially gerrymandered, unconstitutional Twelfth District in the original 1992 plan and the First District in the new plan is based on the racially gerrymandered, unconstitutional First District in the original 1992 plan. Thus, each of these districts improperly relies on the unconstitutional earlier plan and so violates the principles established in *Abrams v. Johnson*, Nos. 95-1425, 95-1460, 1997 U.S. Lexis 3863, which was decided today, June 19, 1997. Likewise, the Twelfth and First Districts in the new plan reflect the continuing efforts of the Department of Justice to interpret and apply sections of the Voting Rights Act in an unconstitutional manner; and also for this reason the new plan violates *Abrams v. Johnson*. The relationship between the new plan and the original plan that was held unconstitutional in *Shaw v. Hunt* is so close that the new plan must be treated as the "fruit of the poisonous tree" and held to be tainted by the violations of equal protection in the earlier plan.

6. By virtue of the changes that have been made by the redistricting plan submitted to this Court on April 1, 1997, none of the original Plaintiffs appear to have standing to challenge the new plan. *United States v. Hays*, 115 S.Ct. 2431 (1995). The additional Plaintiffs do not reside in the Twelfth

District as originally constituted, nor in the new Twelfth District.

7. Because of the lack of standing of the Plaintiffs, there appears to be no matter at issue before this Court with respect to the new redistricting plan. Although Plaintiffs believe and claim that the new plan is unconstitutional, they recognize that due to their lack of standing, any attack on the constitutionality of the new redistricting plan should be undertaken in a separate action maintained by persons who have standing.

WHEREFORE, Plaintiffs pray this Court:

1. That the Court expressly find that the First District, as configured in the earlier plan, was unconstitutional because of the clear absence of narrow-tailoring;

2. That this Court not approve or otherwise rule on the validity of the precleared congressional redistricting plan submitted to it on April 1, 1997; but if it does rule, that it hold the new plan to be unconstitutional;

3. That the Court dismiss this action without prejudice to the right of any person having standing to maintain a separate action attacking the constitutionality of the precleared congressional redistricting plan.

PLAINTIFFS' RESPONSE, CONTINUED . . .

Respectfully submitted this the 19th day of June 1997.

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